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THE POSITIVE IMPACT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A CASE STUDY ON THE SOUTH PACIFIC AND LESSONS FROM THE U.S. EXPERIENCE

Paul Harpur* and Richard Bales**

I. INTRODUCTION

The personal integrity of persons with disabilities has been systematically violated for centuries. In 2006, the United Nations, recognizing the vulnerability of persons with disabilities, adopted the Convention on the Rights of Persons with Disabilities (CRPD).\(^1\) The CRPD was developed with the support of hundreds of disabled people’s organizations, interest groups, and non-governmental organizations; it has been approved unanimously by the United Nations General Assembly; and it has eighty-two ratifications and 144 signatories.\(^2\) The rigor that led to the creation of the CRPD provides the articles of this Convention particular credibility.

Many of the States that ratified or signed the CRPD now are in the process of drafting disability-rights legislation. The CRPD provides one model for the legislative protection necessary for persons with disabilities to enjoy their human rights. The United States, which has had a disability-rights statute since 1991, offers a similar model for legislation.

This article will analyze the positive impact the CRPD is having in stimulating and guiding legislative protections in developing States. It will briefly consider legislative protection in South Pacific States,\(^3\) and will then

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3. See infra Part III.A.
analyze policy and pending legislative reforms in Vanuatu, the first Pacific Island State to ratify the CRPD. 4 This article will compare the recently released Vanuatu National Disability Policy and Plan of Action 2008-2012 to the provisions of the CRPD and provide recommendations based upon experiences from U.S. laws. 5

II. THE RIGHTS OF PERSONS WITH DISABILITIES AND THE EMERGENCE OF THE CRPD

A. The Problem

“Disabled people have been discriminated against, marginalized, and segregated from society for most of human history.” 6 Disability discrimination and lack of accommodation affects millions of people in the Australasia-Pacific region. The United Nations Economic and Social Commission for Asia and the Pacific estimates that more than 400 million persons with disabilities live in the Asia/Pacific region. 7 The Papua New Guinea government estimates that about ten to fifteen percent of the individuals of that State, or about 520,000 people, have a disability. 8

The preamble to the CRPD explains that the United Nations adopted the CRPD based on twenty-five key facts. One of these is “that the majority of persons with disabilities live in conditions of poverty,” thus creating a “critical need to address the negative impact of poverty on persons with disabilities.” 9 The World Bank estimates that persons with disabilities make up twenty percent of the world’s poorest people. 10 The United Nations Economic and Social Commission for Asia and the Pacific has observed that “[t]he Asian and Pacific region has by far the largest number of people with disabilities in the world. Most of them are poor, their concerns unknown and their rights overlooked.” 11

4. See infra Part III.B.
5. See infra Part III.B.
9. CRPD, supra note 1, at Preamble(t).
Economic and cultural factors constrain the ability of persons with disabilities to exercise their economic rights, such as access to gainful employment. The United Nations Economic and Social Commission for Asia and the Pacific Review in 2002 claimed there was need for coordination between non-governmental organizations and public bodies, legislative protection, access to buildings and schools for persons with disabilities, education for persons with disabilities, and education of the public. The 2003 United Nations Economic and Social Commission for Asia and the Pacific Review observed that these reforms have only reached a very small percentage of persons with disabilities.

Unlike other groups requiring special protection, persons with disabilities historically have not received any specific protection under international laws. Following World War II, the community of nations posited the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments specifically protect the rights of minority groups but do not specifically protect persons with disabilities. For example, Article 2 of the UDHR states: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Similarly, Article 2 of the ICCPR and Article 2 of the ICESCR require States to enforce the rights under these conventions, without distinction or discrimination of any kind on such basis as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Philip Alston has observed that “the relevant norms were in fact


17. The ICCPR uses the term “distinction” where the ICESCR uses the term “discrimination.” See International Covenant on Civil and Political Rights, supra note 15, art. 2; International Covenant on Economic, Social and Cultural Rights, supra note 15, art. 2.
interpreted and applied for many years in a way which tended to overlook or even entirely ignore [disabled persons].”

While no specialized convention was historically adopted, the United Nations has made declarations to provide persons with disabilities limited protection under international law. The United Nations proclaimed via General Assembly resolution 2856 (XXVI) of December 20, 1971, the Declaration on the Rights of Mentally Retarded Persons (1971). This Declaration provided a guide about how States should treat members of this group. The intent of this Declaration can be evinced by Article 1, which states: “The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.” Following this Declaration, the Declaration on the Rights of Disabled Persons was proclaimed by General Assembly resolution 3447 (XXX) on December 9, 1975. The thirteen articles of this Declaration are not binding and provide a general indication of how the rights of persons with disabilities should be protected.

In 1993, the United Nations adopted a more dynamic Declaration in the Standard Rules on Equalization of Opportunities for Persons with Disabilities. Even though this Declaration was non-binding, this instrument was the first international law that expressly recognized that persons with disabilities are entitled to enjoy all human rights in the same way as other members of the community.


20. Id. art. 1.

21. Id. art. 1.


B. Introducing the CRPD

In 2001, the United Nations General Assembly established an Ad Hoc Committee to report on the possibility of the United Nations adopting a disability-specific, human rights convention. Ultimately, this process resulted in the CRPD being presented to the General Assembly on December 5, 2006. On December 13, 2006, the United Nations General Assembly unanimously adopted the CRPD. The adoption of this Convention followed five years of transparent negotiations, which involved States and non-governmental actors, from the global north and south. The CRPD is the first general human rights convention to protect persons with disabilities.

The adoption of the CRPD represents a paradigm shift from the medical model to an environmental model to a social justice model of disability. Under the medical model, persons with disabilities were treated as second class citizens who had a medical condition preventing their full enjoyment of human rights. It was generally assumed that there was a baseline of minimal abilities needed to function “normally” in society, often predicated on an assumption of the biological inferiority of individuals who did not measure up. This model was invoked, at best, for arguments that society had an obligation to provide welfare support and to assist persons with disabilities to manage their disabilities. At worst, the model was used to justify segregating, institutionalizing, sterilizing, denying medical treatment to, or otherwise excluding disabled individuals from society.

Beginning in the 1980s, the medical model of disability began to give way to an environmental model. Environmentalists argue that disability is socially constructed. Environments are not fixed and immutable, but can be changed so they require greater or lesser degrees of individual ability. If the environment

27. Melish, supra note 1, at 37.
32. LIACHOWITZ, supra note 29.
33. Hahn, supra note 28.
is changed (e.g., by altering physical environments and job descriptions) to require a lesser degree of ability, fewer people would be disabled.

More recently, the environmental model of disability has given way to a social justice model. Under the social justice model, the underlying principle is that disability should be regarded as an aspect of social diversity. Marilyn Howard has explained the differences between these models, noting that “[t]he medical model emphasises impairment as the main barrier; the social model, society’s need to adjust.” To explain the importance of the shift from the medical model to the social justice model, Stein stated that “most societies have historically assumed disabled persons are less capable than nondisabled persons. The social model underscores the manner in which disability is culturally constructed.”

Tara Melish has observed that “[r]atification of the Convention will . . . require States to think strategically about accessibility and reasonable accommodation for persons with disabilities in all . . . areas of life.” Under this paradigm shift, persons with disabilities are regarded as being entitled to the same human rights as people without disabilities. Disability is not regarded as a medical condition but an aspect of social diversity.

Article 3 of the CRPD emphasizes “[r]espect for inherent dignity,” “[n]on-discrimination,” “[e]quality of opportunity,” and “[a]ccessibility.” These fundamental principles are only achieved where there is substantive equality for persons with disabilities. Laws should empower persons with disabilities to exercise “[f]ull and effective participation and inclusion in society.” In addition, laws must respect differences and accept “persons with disabilities as part of human diversity and humanity.”

The social justice model can be conceived as forming part of a comprehensive civil rights policy to ensure equality. The CRPD does not provide detailed implementing steps with specific standards or benchmarks. Instead, it provides overarching principles and rights, which must be protected in

The CRPD drafters adopted this approach “precisely to ensure that the Convention’s text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development.”

The first two articles of the CRPD are introductory articles, which describe the Convention as a rights-based instrument. Article 1 provides that the purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.” The United Nations Department of Economic and Social Affairs has observed:

The . . . [CRPD] is a human rights instrument with an explicit social development dimension. It reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms on an equal basis with others. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights, where their rights have been violated, and where protection of rights must be reinforced.

The CRPD provides a broad definition of the physical and mental conditions that qualify for protection. Article 1 defines persons with disabilities to “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” This section of the CRPD defining individuals protected by the CRPD can be distilled into three key principles: (1) a list of impairments that qualify as disabling should be non-exclusive; (2) disabling impairments should include at least physical, mental, intellectual, and sensory impairments; and (3) there should be a low threshold for an impairment to be legally protected.

Persons with disabilities are protected by rights found in CRPD Articles 3 to 9, which include universal rights, and Articles 10 to 30, which include substantive rights. These rights often restate existing rights, but some of the rights are included to ensure that the well-established rights can be realized. For

44. CRPD, supra note 1, art. 3(d).
45. Melish, supra note 1, at 45.
46. CRPD, supra note 1, art. 1.
48. CRPD, supra note 1, art. 1.
50. CRPD, supra note 1, arts. 3-30.
example, the right to equality and non-discrimination is well established.\footnote{51} To realize this right, the CRPD includes a right to access buildings, schools, programs, and public transport;\footnote{52} a right to live independently and to be included in the community;\footnote{53} a right to personal mobility;\footnote{54} freedom of expression and opinion and access to information;\footnote{55} a right to have privacy protected;\footnote{56} a right to participate in political life;\footnote{57} and a right to participate in cultural life, recreation, leisure, and sport.\footnote{58} Further, the right to life\footnote{59} and to be free from torture or cruel, inhuman, or degrading treatment or punishment are well-established rights.\footnote{60} To ensure these rights, the CRPD includes rights that are primarily relevant to persons with disabilities such as the rights to respect for home and the family,\footnote{61} to health care,\footnote{62} to habitation and rehabilitation,\footnote{63} to work, and to an adequate standard of living and social protection.\footnote{64} Finally, CRPD Articles thirty-one to forty establish implementation and monitoring schemes, and Articles 41 to 50 provide rules governing the operation of the CRPD.\footnote{65}

To protect persons with disabilities, the CRPD provides that States should have robust domestic legislation to protect the rights of persons with disabilities, and that this legislation must be enforced.\footnote{66} Article 4(1) requires States to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities.”\footnote{67} To achieve this end, Article 4 requires States, among other things:

\begin{itemize}
  \item To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention [CRPD];\footnote{68}
  \item To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;\footnote{69}
\end{itemize}

\footnotesize
\begin{enumerate}
  \item CRPD, supra note 1, art. 5.
  \item CRPD, supra note 1, art. 9.
  \item CRPD, supra note 1, art. 19.
  \item CRPD, supra note 1, art. 20.
  \item CRPD, supra note 1, art. 21.
  \item CRPD, supra note 1, art. 22.
  \item CRPD, supra note 1, art. 29.
  \item CRPD, supra note 1, art. 30.
  \item CRPD, supra note 1, art. 10.
  \item CRPD, supra note 1, art. 15.
  \item CRPD, supra note 1, art. 23.
  \item CRPD, supra note 1, art. 25.
  \item CRPD, supra note 1, art. 26.
  \item CRPD, supra note 1, arts. 27-28.
  \item CRPD, supra note 1, arts. 31-50.
  \item CRPD, supra note 1, arts. 31-50.
  \item CRPD, supra note 1, art. 4(1).
  \item CRPD, supra note 1, art. 4(1)(a).
\end{enumerate}
• To take into account the protection and promotion of the human rights of persons with disabilities in all public policies and programmes;\textsuperscript{70} [and]

• To refrain from engaging in any act or practice that is inconsistent with the present Convention [CRPD] and to ensure that public authorities and institutions act in conformity with the present Convention [CRPD].\textsuperscript{71}

To give full effect to the CRPD, “implementing legislation will usually still be required” even if a State has ratified and introduced the CRPD into domestic law.\textsuperscript{72}

III. DO LAWS IN PACIFIC ISLAND STATES ADEQUATELY PROTECT PERSONS WITH DISABILITIES?

A. How the CRPD Approaches Social and Economic Rights in Less Developed States

The process of consulting with stakeholders, drafting legislation, and implementing effective laws that comply with the CRPD could be beyond the financial means of less-developed States. Article 4(2) anticipates the financial burden of implementing the CRPD.\textsuperscript{73} Article 4(2) provides:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.\textsuperscript{74}

To meet the level of protection anticipated by the CRPD, Pacific Island States must at least have robust domestic anti-discrimination laws that are enforced. As will be explored below, except for Fiji, and to a lesser extent Papua New Guinea, Palau, and Vanuatu, there is an acute regulatory hole in Pacific Island States’ protection of the rights of persons with disabilities. Fiji is

\textsuperscript{69} CRPD, \textit{supra} note 1, art. 4(1)(b).
\textsuperscript{70} CRPD, \textit{supra} note 1, art. 4(1)(c).
\textsuperscript{71} CRPD, \textit{supra} note 1, art. 4(1)(d).
\textsuperscript{72} ANDREW BYRNES \textit{ET AL.}, FROM EXCLUSION TO EQUALITY: REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES: HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION FOR THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL 54 (2007) (this is the official United Nations Handbook to the CRPD).
\textsuperscript{73} CRPD, \textit{supra} note 1, art. 4(2).
\textsuperscript{74} CRPD, \textit{supra} note 1, art. 4(2).
the only South Pacific Island State to expressly protect the rights of persons with disabilities in its Constitution. Chapter 4 of the Constitution of the Republic of the Fiji Islands 1997 contains the Bill of Rights.75

Article 38 of the Fiji Constitution provides for equality before the law. Article 38(2) prohibits discrimination, stating:

A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability . . . .

Fiji enforces these constitutional rights through the Fiji Human Rights Commission. The Human Rights Commission Act 1999 expressly defines where discrimination is prohibited and states that affirmative action to achieve “social justice” is permitted.77

In addition, Fiji has enacted the Fiji National Council for Disabled Persons Act 1994.78 This enactment establishes the Fiji National Council for Disabled Persons, which is the national coordinating body on disability policies, and has advisory committees on health, legal services, housing, transport, employment, and sports and recreation.79 Fiji has attempted to promote the education and employment of persons with disabilities through affirmative action programs for persons with disabilities under the Social Justice Act 2001.80 Based upon this constitutional and legislative protection, it is possible to conclude tentatively that there is a reasonable degree of formal legislative protection of persons with disabilities in Fiji. A search of Fiji cases and reports did not identify any significant action to protect the legal rights of persons with disabilities.

The protection afforded to persons with disabilities in Palau is less extensive than in Fiji. Palau has no general laws protecting the human rights of persons with disabilities, but Palau has enacted the Equal Employment Opportunities Act 1993, which prevents discrimination based upon disability in employment relationships.81 Palau also has passed the Accessibility Act 1997, which

79. Id.
provides a minimal financial allowance to families with children who both are under the age of twenty-one and have disabilities requiring twenty-four-hour care.  

Where the Fiji and Palau laws purport to provide some protection of the rights of persons with disabilities, some Pacific Island States provide no legislative protection against disability discrimination at all. For example, in the Cook Islands, Tonga, Federated States of Micronesia, Nauru, and Niue, there are no general anti-discrimination laws to protect persons with disabilities, although some of these States do specifically protect other groups in society from discrimination. For example, the Cook Islands Constitution provides: “It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms . . . .” The Cook Islands prohibit racial discrimination through the Race Relations Act 1972. Disability protection, however, is not protected by its own statute or by the Cook Islands Industrial and Labour Ordinance 1964 or the amendments to this statute.

Similarly to the Cook Islands, the Constitution of Kiribati 1979, the Constitution of Tuvalu 1978, and the Constitution of the Solomon Islands 1968 prohibit discrimination on grounds including race, places of origin, political belief, or religion. Disability is not mentioned. There are no general anti-discrimination laws to protect persons with disabilities in Kiribati, Solomon Islands, or Tuvalu.

Even where constitutions empower parliaments to protect persons with disabilities, this power has not always been exercised. For example, the

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83. COOK ISLANDS CONSTITUTION art. 64, available at http://www.paclii.org/ck/legis/num_act/cotci327/.
87. E.g., Industrial Relations Code [Cap 85] (1974) (Tuvalu), available at http://www.paclii.org/tv/legis/consol_act/irc244/ (showing that Tuvalu’s Industrial Relation Code does not prohibit any form of discrimination); Employment Act [Cap 30], § 33 (1977) (Kiribati), available at http://www.paclii.org/ki/legis/consol_act/ea149/ (showing that to encourage the employment of persons with disabilities the Employment Ordinance § 33 enables employers to make an application to the courts to pay persons with disabilities below the minimum wage).
Constitution of Samoa 1962 has a general equality clause in Section 15 which reads, “[a]ll persons are equal before the law and entitled to equal protection under the law.”\textsuperscript{88} Although there is no specific protection against disability discrimination, Section 15(3) does empower the Parliament to make laws for the “protection or advancement of . . . any socially or educationally retarded class of persons.”\textsuperscript{89} To date, no general anti-discrimination laws have been enacted. The only disability protection in Samoa is the Komesina O Sulufaiga (Ombudsman) Act 1988.\textsuperscript{90} Under this enactment, complaints of disability discrimination by the government can be lodged with the Ombudsman.\textsuperscript{91} The Ombudsman can investigate complaints and report to Parliament.\textsuperscript{92}

There are two Pacific Island jurisdictions that have made moves to introduce general anti-discrimination laws to protect the rights of persons with disabilities. In Papua New Guinea, the Constitution of the Independent State of Papua New Guinea\textsuperscript{93} established a body specifically designed to protect human rights.\textsuperscript{94} Article 218 of Papua New Guinea’s Constitution provides general discrimination protection through the Ombudsman Commission.\textsuperscript{95} The Ombudsman Commission serves to “help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them.”\textsuperscript{96} Article 219 empowers the Ombudsman Commission to “investigate . . . any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices.”\textsuperscript{97} The primary law prohibiting discrimination in Papua New Guinea is the Discriminatory Practices Act 1963.\textsuperscript{98} This Act prohibits discrimination “of another person or group of persons for reasons only of colour, race or ethnic, tribal or national origin.”\textsuperscript{99} There is no protection for persons with disabilities.\textsuperscript{100}

Papua New Guinea has introduced disability protection laws as part of a broader policy to improve the lives of persons with HIV and AIDS. The

\textsuperscript{89} Id. § 15(3).
\textsuperscript{91} Id. §§ 11(1)-(2).
\textsuperscript{92} Id. §§ 11(1), 19(4).
\textsuperscript{94} See id. arts. 217-20.
\textsuperscript{95} Id. art. 218.
\textsuperscript{96} Id. art. 218(b).
\textsuperscript{97} Id. art. 219(1)(a)(iv)(B)(c).
\textsuperscript{99} Id. § (1).
\textsuperscript{100} See id.
HIV/AIDS Management and Prevention Act 2003101 introduces a national management scheme to fight the problems associated with HIV/AIDS.102 It is now unlawful to discriminate against or stigmatize a person on the grounds that the person is infected with or affected by HIV/AIDS.103 The statute prohibits discrimination on the basis of HIV/AIDS status in employment, partnerships, professional or sporting organizations, education, provision of accommodation or housing, and provision of or access to goods, services, and public facilities.104 A person discriminated against in these ways can apply to the national or district court for relief.105 Such relief may include, but is not limited to, a declaration that the conduct is unlawful, an injunction, an order for apology, and damages for losses incurred and/or pain and suffering.106

Providing this enactment is enforced, the HIV/AIDS Management and Prevention Act 2003 clearly meets the legislative standards anticipated by Article 4 of the CRPD,107 but only with respect to discrimination based on HIV/AIDS status. There is no general anti-disability-discrimination act in Papua New Guinea. Comprehensive disability legislation has been considered in Papua New Guinea, but has not been laid before Parliament. In 1995, the National Board and the National Department of Community Development completed a draft Disability Act, but this draft bill has not been advanced in over a decade.108

The most extensive protection for persons with disabilities in Vanuatu is in education. Section Eight of the Education Act No. 21 of 2001109 provides that children must not be refused admission to education based upon gender, religion, nationality, race, language, or disability.110 However, this non-discrimination provision does not guarantee that students with disabilities will receive appropriate educational opportunities. For example, even if a deaf student using sign language is permitted to attend class with his or her peers, the quality of that

104. HIV/AIDS Management & Prevention Act, supra note 101, § (7)(a)-(h).
105. HIV/AIDS Management & Prevention Act, supra note 101, § 28(1).
106. HIV/AIDS Management & Prevention Act, supra note 101, § 28(3).
107. CRPD, supra note 1, art. 4(1)(b) (calling on States Parties to enact legislation to eradicate discrimination against disabled persons).
110. Id. § (8)(1).
student’s education would be substandard if there is no lip-reading training or sign language provided in the classroom.

Other Vanuatu laws provide persons with disabilities no significant protection. The Constitution of the Republic of Vanuatu prohibits discrimination in Article 5, but fails to specifically protect against disability discrimination:

The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health . . . . 111

Vanuatu has other antidiscrimination laws, but like the Constitution, these laws do not always protect persons with disabilities. For example, Section Eight of the Employment Act112 prohibits sex discrimination in employment,113 but there is no equivalent provision for persons with disabilities in this statute.

It appears that, except for Fiji and, to a lesser extent, Palau, Papua New Guinea and Vanuatu, none of the above Pacific Island States have laws reflecting the standards posited by the CRPD. The CRPD requires States to enact and enforce robust legislative protection.114 To date, a number of Pacific Island States fail to provide adequate legislative protection to ensure that persons with disabilities can exercise their human rights.

B. How Can Vanuatu Achieve the Objects of the CRPD?

Vanuatu has a strong commitment to the CRPD. Vanuatu was the first South Pacific State to sign the CRPD on May 17, 2007.115 The Vanuatu legislature then unanimously ratified the CRPD on June 23, 2008, through enacting the Convention on the Rights of Persons with Disabilities (Ratification) Act 2008.116 On October 23, 2008, Vanuatu deposited its ratification of the CRPD with the

113. Id. § (8).
114. See CRPD, supra note 1, art. 4.
United Nations, and, on November 22, 2008, the CRPD became effective in Vanuatu.117

The Convention on the Rights of Persons with Disabilities does not create any actionable rights in itself.118 As previously mentioned, adopting States must enact their own enforcement provisions.119 To this end, Vanuatu has launched a National Disability Policy and Plan of Action 2008-2015.120

As discussed in Part II.B, the CRPD prohibits disability discrimination in a wide variety of contexts, such as education and public transportation. The Vanuatu National Disability Policy prohibits disability discrimination in a similarly wide variety of contexts.121 For purposes of illustration, this article will focus upon how the CRPD and the Vanuatu National Disability Policy ensure disabled individuals the right to work.

Article 27 of the CRPD requires States to remove barriers that impede individuals with disabilities from exercising their right to work.122 Article 27(1) requires States to introduce laws to:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

117. High Comm’r, supra note 115.
118. See Convention on the Rights of Persons with Disabilities (Ratification) Act, supra note 116, §§ (1)-(2) (ratifying the CRPD but making no dispositive provisions as enforcement of rights).
121. National Disability Policy, supra note 120, § 1 (stating that the policy directives are focused on the following areas: education, training, employment, and access to built environment and public transport).
122. CRPD, supra note 1, art. 27(1).
(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.\(^{123}\)

These eleven clauses reflect the social inclusion model discussed in Part II.B of this article and require signatories to reduce systematic barriers in society. These clauses can be divided into two groups. Clauses (a), (b), (c) and (d) require the State to prevent people in society from excluding people with disabilities.\(^{124}\) These clauses focus on ensuring a person is not excluded from work due to his or her disabilities. The remaining clauses\(^{125}\) require more proactive interventions to ensure inclusion. These proactive duties require signatories to enact laws and policies that will remove the barriers to social inclusion and assist people with disabilities to reach their full potential in the labour market.\(^{126}\)

The National Disability Policy adopts various strategies to increase the ability of persons with disabilities to exercise their right to work.\(^{127}\) These measures can be broadly grouped into implementing general anti-discrimination legislation, measures to increase educational opportunities for persons with disabilities, legislative support for universal design, and measures to directly increase the representation of persons with disabilities in the workforce.\(^{128}\)

\(^{123}\) CRPD, \textit{supra} note 1, art. 27(1).

\(^{124}\) CRPD, \textit{supra} note 1, art. 27(1).

\(^{125}\) CRPD, \textit{supra} note 1, art. 27(1)(e)-(h).

\(^{126}\) See CRPD, \textit{supra} note 1, art. 27(1)(e)-(h).

\(^{127}\) National Disability Policy, \textit{supra} note 120, § 8.4.

\(^{128}\) National Disability Policy, \textit{supra} note 120, § 8.
1. Introduction of Anti-Discrimination Legislation into Vanuatu

To implement CRPD Article 27, the National Disability Policy aims to “[a]mend Article 5(1) of the Constitution to include disability as a ground for non-discrimination” and to “[e]xamine and/or enact anti-discriminatory legislation, where appropriate, that protects the rights of workers with disabilities...” The anti-discrimination legislation adopts the broad definitions of “persons with disability” and “discrimination” from the CRPD.

While adopting the definitions directly from the CRPD is an extremely positive step, to ensure that persons with disabilities receive the protection intended by the CRPD and Vanuatu legislature, it is necessary to provide additional guidance beyond just using the definitions provided by the CRPD. CRPD Article 2 defines “discrimination on the basis of disability” to mean “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Denial of reasonable accommodation is included as a form of discrimination.

If Vanuatu had simply adopted the definition in CRPD Article 2, then Vanuatu likely would have confronted difficulties in implementation.

The operation of the United States’ Americans with Disabilities Act (ADA) provides an example of the problems that can occur when a judiciary must interpret anti-discrimination legislation. The original Americans with Disabilities Act of 1990 was intended to protect the rights of individuals with disabilities and to “assure equality of opportunity,” much like the intended purpose of the CRPD. In 2009, the United States Congress enacted the Americans with Disabilities Act Amendments Act of 2008, emphasizing the intention of the original act. These amendments operate to clarify the

129. National Disability Policy, supra note 120, § 8.1.2.
130. National Disability Policy, supra note 120, § 8.4.2.
131. See National Disability Policy, supra note 120, § 8.1.2.
132. See International Labour Office, supra note 119, at 30 (“The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.”).
133. CRPD, supra note 1, art. 2.
134. CRPD, supra note 1, art. 2.
137. See CRPD, supra note 1, art. 1.
139. Id. § 12101(b)(1), 122 Stat. at 3554.
definition of disability and extend protection to a broader group of disabled individuals.\(^\text{140}\)

When enacting the Americans with Disabilities Act of 1990, the 101st Congress found that disabled individuals face significant difficulties in the areas of employment and that steps should be taken to provide this group of people with the means to gain equal footing in the workplace and daily life.\(^\text{141}\) After years of coverage under the Americans with Disabilities Act, many individuals with disabilities were still missing out on the protections intended to be provided by the Act.\(^\text{142}\) The amendments to the ADA were intended to expand coverage by more clearly defining disability and by rejecting several Supreme Court cases that narrowly construed the application of the ADA.\(^\text{143}\) The amendments specifically state that courts had too narrowly interpreted the standards by which an individual would qualify as disabled, and that the purpose of the ADA Amendments Act was to extend protection to more people with disabilities.\(^\text{144}\)

Under the ADA, employers must provide reasonable accommodations to individuals with disabilities.\(^\text{145}\) The term “reasonable accommodation” is a key element of the ADA because it imposes a requirement on employers, and is used for determining whether an individual is a “qualified individual” for purposes of the Act.\(^\text{146}\) A person is a “qualified individual” if she or he “can perform the essential functions of the job with or without reasonable accommodation.”\(^\text{147}\) Providing a “reasonable accommodation” means changing existing facilities to make them accessible and useable by disabled individuals, as well as restructuring job descriptions (such as adjusting work schedules, reassigning employees, or providing interpreters or readers, among other things).\(^\text{148}\) The need for reasonable accommodations permeates every aspect of a work day, from receiving transportation to actually getting to work, to performing a job.\(^\text{149}\) Reasonable accommodations are meant to help disabled individuals succeed in

\(^{140}\) Id. § 12101(a)(3), 122 Stat. at 3553.


\(^{142}\) ADA Amendments Act, § 12101(a)(4), 122 Stat. at 3553.

\(^{143}\) Id. § 12101(a)(4)-(8), 122 Stat. at 3553-54 (overriding Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) because the U.S. Supreme Court had “narrowed the broad scope of protection intended to be afforded by the ADA” in those cases).

\(^{144}\) Id.


\(^{146}\) See Basas, supra note 145, at 66-67.

\(^{147}\) Basas, supra note 145, at 67; see also 42 U.S.C.A. § 12111(8) (West 2009).

\(^{148}\) 42 U.S.C.A. § 12111(9).

\(^{149}\) See Basas, supra note 145, at 80-95.
the work environment, and failure to properly accommodate a disabled employee is the equivalent of discrimination under the ADA.150

The United States Equal Employment Opportunity Commission (EEOC) determines on a case-by-case basis what constitutes a reasonable accommodation, basing the decision on the particular needs of a disabled individual.151 However, just as there are problems defining who is protected by the statute, there also are problems defining the limits of what an employer must do to accommodate individuals who are protected.152 Under the ADA, employers must provide only accommodations that are “reasonable” and need not provide accommodations that would impose an “undue hardship” on the employer.153 This hardship is evaluated based on financial burden, the nature of the accommodation,154 the size of the employer’s workforce, and the effect the expense of the accommodation has on the facility in question.155 Employers have not been shy about claiming that proposed accommodations are unreasonable or impose undue hardship, and, prior to the enactment of the ADA Amendments Act, courts often agreed with employers.156

American courts, thus, have long had difficulty defining critical provisions of the ADA, particularly the provisions specifying who is protected by the statute and the limits the statute places on the duty of employers to offer accommodations.157 The American experience illustrates the difficulties Vanuatu likely would have faced if it chose simply to adopt wholesale the language used by the CRPD without providing employers more precise direction.

150. 42 U.S.C.A. § 12112(b)(5) (West 2009) (for a more complete description of what constitutes discrimination under the ADA, see § 12112 in its entirety).
151. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R app. § 1630 (2000) (Background); see also Basas, supra note 145, at 67-69.
153. See 29 C.F.R. app. § 1630 (Background).
156. See Basas, supra note 145, at 112 (“The language of reasonableness was never intended to preclude creativity and effort, even though its interpretation by jurists and employers has been rigid.”). For examples of how employers resist making reasonable accommodations, see id. at 113-115. See also John E. Matejkovic & Margaret E. Matejkovic, What is Reasonable Accommodation under the ADA? Not an Easy Answer; Rather a Plethora of Questions, 28 Miss. C. L. Rev. 67, 69 (2009) (“According to surveys conducted by the American Bar Association, employers won 98% of the ADA employment cases resolved in 2003 and nearly 95% in 2002.”).
2. Educational Amendments

To improve the educational opportunities of persons with disabilities, the Vanuatu National Disability Policy proposes to “amend the Education Act to incorporate ‘inclusive’ and ‘special’ education and amend the Act to prohibit discrimination on the grounds of chronological age as a pre-condition to entering schools.” Through the implementation of this policy, by 2012, thirty percent of vocational training courses should include persons with disabilities. The National Disability Policy and Plan of Action claims that “the overall goal of inclusive education is a school where all children are participating and treated equally.” It is important, however, for any educational policy to distinguish between formal and substantive equality.

The National Disability Policy includes several policy objectives but no extensive legislative interventions. For example, the policy includes a public education campaign, which makes it the “responsibility of the school to accommodate differences in learners;” ensures there is “adequate budgetary allocation specifically for the education of children with disabilities;” and enables teachers to have training and access to appropriate teaching materials. While these policy objectives are admirable, they fall short of the legislative protection required to ensure persons with disabilities can exercise their rights to education.

To enable persons with disabilities to exercise their rights to education, CRPD Article 24(2) requires State Parties to ensure that:

(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

158. National Disability Policy, supra note 120.
159. National Disability Policy, supra note 120, § 8.1.2.
160. National Disability Policy, supra note 120, § 8.4.2.
161. National Disability Policy, supra note 120, § 8.4.1.
163. National Disability Policy, supra note 120.
164. National Disability Policy, supra note 120, § 8.4.1
(c) Reasonable accommodation of the individual’s requirements is provided;
(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.165

The United States provides a good example of the level of legislation required to ensure that persons with disabilities can exercise their right to education. The Individuals with Disabilities Education Act (IDEA),166 originally passed in 1990 and reauthorized in 2004, requires that children with disabilities must receive a “free appropriate public education” and that these children and their families’ rights should be protected.167 In accordance with the purpose of the ADA,168 IDEA also emphasizes that proper rights to education should be provided so that disabled children are prepared to enter society as productive adults.169

Children ages preschool through twenty-one are covered under the Act170 if they meet the definition of disability and require specialized education.171 Schools must provide each qualified student with an individualized education program (IEP), as well as other related services.172 A team to design the IEP is comprised of the student’s parents, regular and special education teachers, and specialists with information on the child’s specific disability.173 An IEP is required to contain specifics on the school’s plan for specialized education, including the frequency of testing (if any), progress reports, and services provided to the child to meet the needs of her or his disability.174 Schools also

165. CRPD, supra note 1, art. 24(2).
171. Id. § 1401(3)(A) (listing the following as qualifying disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities).
172. Id. § 1414(d); see also Ann K. Wooster, What Constitutes Services that Must Be Provided by Federally Assisted Schools under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. FED. 1, § 1[a] (2000).
may also be required, under the IDEA, to provide other related services, such as specialized transportation services to accommodate physical disabilities, accommodations such as interpreters and speech therapy services, and related services.

Reauthorized in 2004 as the Individuals with Disabilities Education Improvement Act, the IDEIA imposes the same restrictions and mandates as the IDEA, but aligns the act with the No Child Left Behind Act of 2001 (NCLB), a legislative act requiring schools to conduct standards-based testing as a prerequisite to receiving federal funding. This change primarily focused on how disability programs would be funded and allowed certain states to experiment with three-year IEPs for students instead of the traditional year-by-year development of these plans. Amended multiple times since its original inception, IDEA provides an example of how heavily legislated disabilities in education must be. The United States requires strict compliance with the rules laid out in IDEA, IDEIA and NCLB in order for states to receive funding for their school systems. Non-compliance with the rules laid out in these laws subjects schools to enforcement actions, and may under some circumstances be considered discriminatory. The objectives and requirements set forth in IDEA and its subsequent amendments meet the standards set forth by the CRPD in providing disabled individuals with equal opportunity for an education, and as

176. Wooster, supra note 172, § 20[a].
177. Wooster, supra note 172, §§ 28[a], 29-35.
183. See Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 520 (2007) (explaining that as a condition of receiving federal funds under the IDEA, the school district must comply with IDEA’s mandates); Sch. Dist. of Pontiac v. Sec’y of U.S. Dept. of Educ., 584 F.3d 253, 262 (6th Cir. 2009) (stating that the Secretary of the Department of Education has interpreted NCLB as requiring states to “implement the [NCLB] law in its entirety” if it receives federal funding under the NCLB) (quoting Rodney Paige, Sec’y, U.S. Dep’t of Educ., Remarks to National Urban League (Mar. 25, 2004)).
184. See 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). To prevail on a discrimination claim against a school, under the ADA, for failing to provide a free appropriate education, the following elements must be met: (1) student must be “disabled” as defined by the Act; (2) the student must be “otherwise qualified” to participate in school activities; (3) the student must have been “excluded from participation in, denied the benefits of, or subject to discrimination at the school”; and (4) “the school or the board of education knew or should be reasonably expected to know of his disability.” See Ind. Area Sch. Dist. v. H.H., 428 F. Supp. 2d 361, 363 (W.D. Pa. 2006).
185. CRPD, supra note 1.
such is a positive model for Vanuatu in implementing anti-discriminatory educational legislation.

3. Access to Buildings and Public Transport

With respect to access to public facilities and transportation by disabled individuals, Vanuatu’s National Disability Policy includes the following aim:

[E]nsure that barrier-free features are incorporated as a standard requirement in designs and plans for all new constructions, renovations and expansion of buildings and facilities used by members of the public, including transport, public offices and buildings, educational facilities and housing facilities, and to incorporate these provisions into existing building laws where they exist and where they do not exist, to enact new legislation.186

The National Disability Policy explains the types of access that buildings should make available and requires that new public buildings and transport systems be made accessible,187 but it does not explicitly require the retrofitting of existing buildings.

Although Vanuatu’s creation of building-accessibility standards is a big step in the right direction, it is crucial that Vanuatu also ensure that these standards are implemented and enforced. The CRPD requires States to develop specific enforcement mechanisms.188 Article 9 of the CRPD asserts that States must ensure that persons with disabilities have “access, on an equal basis with others, to the physical environment . . . and to other facilities and services open or provided to the public, both in urban and rural areas.”189 Implementing accessibility standards will require political will and significant resources. CRPD Article 9 provides no additional support, nor technical assistance specifying which building elements and features must be accessible, or how and by when member States should meet such standards.190 Likewise, there is no objective, standardized means for measuring a member State’s progress or lack thereof in this regard.191 While Article 9 does not provide for specific standards, Article 9(2) does provide for steps to “[d]evelop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public.”192

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186. National Disability Act, supra note 120, § 1. For a discussion of the policy regarding public access to facilities and transportation in full, see § 8.5.
187. See id. § 8.5 (indicating that entrances, exits, stairs, doors, corridors and rest rooms will be required to be made accessible to the disabled).
188. CRPD, supra note 1, art. 4(1)(a) (urging States Parties to adopt legislative and administrative measures to ensure equality of human rights).
189. CRPD, supra note 1, art. 9(1).
190. CRPD, supra note 1, art. 9.
191. See CRPD, supra note 1, art. 9.
192. CRPD, supra note 1, art. 9(2)(a).
4. Specific Measures on Right to Work

As discussed above in Part III.B.1 of this article, the Vanuatu National Disability Policy advances the notion that the law must forbid employers from discriminating on the basis of disability. The National Disability Policy also contains other measures designed to increase the employment of persons with disabilities. Examples include providing support to nongovernmental organizations (NGOs) that help disabled individuals find jobs, setting a quota requiring that at least 0.4% of the public sector workforce be comprised of individuals with a disability by 2009, and establishing an employer-of-the-year award. The National Disability Policy does not specify the level of financial support that will be provided to NGOs, nor does it require that disabled individuals be proportionally represented at each level of the public sector workforce. If Vanuatu adopts a quota, it is crucial for the quota to have enforcement measures and for the regime to ensure that persons with disabilities are represented at all levels of the government. The quota will be of little use if disabled individuals are hired only for unskilled positions, such as janitors.

To encourage employers to employ people with disabilities, laws must:

• address the belief that employers’ hiring and retention practices relating to people with disabilities are efficient;

• find ways to rebut the assumption that people with disabilities are less productive than their able bodied counterparts; and

• rebut the presumption that the existing labor market is equitable.

As Vanuatu and the rest of the Southern Pacific States move forward in implementing disability protection legislation, they can look to United States’ legislation for guidance as to how to effectively enact laws created to achieve equality in the workplace. And in looking to these legislative models, the South Pacific also should evaluate the conflicts between disabled employees and employers that have arisen as a result of disability legislation. The inherent belief that disabled individuals are not as productive as non-disabled individuals

193. National Disability Policy, supra note 120, § 8.4.2.
194. See National Disability Policy, supra note 120, § 8.4.2.
195. National Disability Policy, supra note 120, § 8.4.2.
196. See National Disability Policy, supra note 120, § 8.4.2.
197. See International Labour Office, supra note 119, at 39 (stating that the impact of a quota in Thailand has been limited because no enforcement mechanisms exist).
199. See id.
200. Stein, supra note 145, at 85. In this article, although the author challenges the presumptions, he recognizes that these are the “three baseline presumptions adopted by scholars who have written on the topic.”
is an initial obstacle, but it is only one of many problems facing disability legislation.

The United States provides excellent examples of the conflicts that arise in the workplace as a result of compliance with disability laws. Because it is the burden of the employer to provide a “reasonable accommodation” under the ADA, conflicts arise between employers, disabled employees, and employees who are not disabled but suffer from the burden imposed by the accommodation. For example, job reassignment to a vacant position is considered a form of reasonable accommodation. However, problems arise when a disabled individual, as part of an accommodation, is assigned to a desirable vacant position, and qualified non-disabled individuals are passed over for that position. Reasonable accommodations for disabled employees may impose a heavier workload on non-disabled employees, often in increased hours or increased demand for physical labor to make up for the excused work of the disabled employee. The United States Supreme Court has addressed the issue of employee reassignment conflict by allowing employers to uphold systems of seniority, meaning that senior employees are not passed over for vacant positions by disabled, less-senior employees.

These issues of conflict illustrate the constant struggle to provide opportunity to disabled individuals in order to promote equality, while not placing undue burdens or limitations on those who do not suffer from disability. The United States’ ADA and the amendments to the ADA show that the burden of providing these accommodations should be placed on the employer; however, the employer’s obligation of providing these accommodations should be limited so as not to produce an undue hardship, thereby alleviating burdens on the employer and possible resentment on the part of non-disabled employees.

IV. CONCLUSION

Millions of persons with disabilities across the globe confront systematic discrimination that prevents them from exercising their human rights. To address this problem the United Nations adopted the CRPD. This article has

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201. 42 U.S.C. § 12112(b)(5).
203. See 29 C.F.R. app. § 1630.2(o).
204. Porter, supra note 145, at 314, 319.
205. Porter, supra note 145, at 319.
206. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403-06 (2001) (holding that the ADA ordinarily does not require the assignment if it would violate the rules of seniority, but that the assignment may be appropriate if the plaintiff proves that the assignment is reasonable).
208. CRPD, supra note 1.
analyzed how the CRPD can assist persons in developing States through guiding and stimulating legislative reform.

This paper began by reviewing what the CRPD requires from State Parties. States that have ratified the CRPD are required to ensure that their domestic laws and policies comply with prescribed overarching principles.209 These principles provide a framework for ensuring that fundamental rights are protected and that the Convention remains relevant. To test the extent to which the principles in the CRPD are being implemented, this paper has focused upon States in the South Pacific.

Most South Pacific States substantially fail to realize the overarching principles posited in the CRPD. Nonetheless, the CRPD is having a positive impact. The first State in the South Pacific to ratify the CRPD was Vanuatu.210 Following the ratification of the CRPD, Vanuatu adopted a National Disability Policy to reform domestic laws and policies to comply with the CRPD.211 The final part of this paper analyzed Vanuatu’s National Disability Policy to determine the extent to which it will enable persons with disabilities to exercise their right to work. This paper identified potential legislative and policy pitfalls that Vanuatu will need to avoid and offered recommendations to improve the reforms. While the reforms in Vanuatu are not perfect, the way in which the CRPD has stimulated such wide-ranging reforms in a jurisdiction, which until now has had virtually no anti-discrimination laws to protect persons with disabilities, is an extremely positive outcome.

209. See supra part II.B.
210. High Comm’r, supra note 115.
211. National Disability Act, supra note 120.
EDUCATION FOR AMERICANS WITH DISABILITIES: RECONCILING IDEA WITH THE 2008 ADA AMENDMENTS

Kathryn M. Smith* and Richard Bales**

I. INTRODUCTION

The typical American student spends at least thirteen years in school, kindergarten through twelfth grade. Students graduating from high school or college in the spring of 2010 went to kindergarten in the same classrooms as students with Down syndrome and cerebral palsy. They had gym, music, and art classes with children who were physically, visually or hearing impaired. They worked on projects for Advanced Placement (AP) History with other students who had attention deficit hyperactivity disorder (ADHD) or dyslexia. They have never known a system that did not include students with disabilities, and they have conceptualized the inclusive environment modeled in the school system as a way of life.

The Individuals with Disabilities Education Act (IDEA) is largely to be credited with the creation of this inclusive culture in American schools. Two additional federal enactments, the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), also are at the heart of the nation’s inclusive culture. The Americans with Disabilities Act Amendments Act (ADAAA), which took effect in January 2009, however, might upset this culture as state departments of education, individual school districts, and educators begin to find they are overwhelmingly facing even more students

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1. Education Resources Information Center, Including Students with Disabilities in General Education Classrooms (1997), http://www.eric.ed.gov/PDFS/ED358677.pdf (discussing the 1975 Individuals with Disabilities Education Act’s requirement that children with disabilities are educated with children who are not disabled to the greatest extent possible).
2. Id.
3. Id.
4. Id.
with a greater variety of disabilities requiring accommodation. Educators may find they are without the guidance or resources to adequately provide services in compliance with all of these laws. While the ADAAA broadens the definition of disability, the IDEA retains a strict construction of the term. Because the ADAAA broadens the definition, the court cases in the future will turn primarily upon the reasonableness of the educators’ accommodations. The disability analysis under the ADAAA no longer considers performance with mitigating measures or devices, and a child’s performance is no longer compared with the average. At the same time, provisions of the IDEA proscribe procedures for identifying more “subtle” learning disabilities that require long-term observation of a student, which are known as “child find” provisions. However, the recent Supreme Court decision in Forest Grove School District v. T.A. leaves schools without time to comply with more long-term methods required to identify specific learning disabilities (SLD). Thus, schools are left with potential increased liability because students with disabilities, especially subtle or newly diagnosed learning disabilities that do not necessarily manifest in obvious achievement deficiencies, now have more protection under the ADA.

This article examines the educational impact of the ADAAA by applying it to factual scenarios presented in ADA education cases from the late-1990s. Each case illustrates the former analysis of an ADA claim, from defining disability to determining reasonable accommodations. The Analysis section of this article sets out a foreseeable shift in the analysis of an ADA claim after the ADAAA. Specifically, the focus will move away from a determination of whether a disability exists, which the ADAAA broadens. Instead, courts will place more emphasis on whether a school discriminated against or reasonably accommodated each student, regardless of a student’s own mitigating measures.

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8. Americans with Disabilities Act Amendments Act, 42 U.S.C.A. §§ 12101-12213 (West 2008); see also ROBERT J. NOBILE, HUMAN RESOURCES GUIDE § 1:7 (2010) (“Beginning in January 2009, for purposes of the ADA, ‘disability’ is to be broadly construed and coverage will apply to the ‘maximum extent’ permitted by the ADA and the ADAAA.”).  
10. Id. at 654-55.  
12. Hensel, supra note 9, at 685-86.  
15. See id.  
or his achievement compared with an “average” student’s performance. The new analysis of an ADA claim is contrasted with the new analysis of an IDEA claim in light of Forest Grove. Finally, this article highlights the unique challenges that public schools face as a result of the ADAAA and IDEA provisions, including accommodating a diverse population of abilities and disabilities.

II. BACKGROUND & FACTS

This section provides an overview of three federal acts that work towards educating and accommodating students with disabilities: the IDEA, Section 504, and the ADAAA. Next, this section provides the background, holdings, and court reasoning in three ADA claims from the 1990s, illustrating the traditional analysis of an ADA claim in the school setting, as well as the way ADA protections overlap with those under Section 504 and the IDEA. Finally, this section provides an overview of the recent Supreme Court decision in Forest Grove, regarding specific provisions for identifying and serving disabilities under the IDEA.

A. Overview of the Individuals with Disabilities in Education Act & Special Education in Public Schools

Before 1975, public education institutions could exclude most children with even minor disabilities. In 1975, however, Congress passed the Education for All Handicapped Children Act of 1975, which later became the IDEA, which provides protection for students with special educational needs. Congress recognized that “the educational needs of millions of children with disabilities were not being fully met” for four main reasons: (1) “the children did not receive appropriate educational services;” (2) “the children were excluded entirely from the public school system and from being educated with their peers;” (3) “undiagnosed disabilities prevented the children from having a successful educational experience;” and (4) “a lack of adequate resources within the public school system forced families to find services outside the public school system.” Since 1975, the number of students with disabilities receiving public education in the United States has risen dramatically.

18. Hensel, supra note 9, at 685-86.
20. See id. at 2484.
The purpose of the IDEA is to ensure a free appropriate public education (FAPE) that meets the unique needs of children with disabilities to “prepare them for further education, employment, and independent living.”

Additionally, the IDEA was designed to “assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities” by enacting a scheme for funding special education programs at the state and local levels.

However, the IDEA narrowly defines a “child with a disability” to include a child identified with one of the following impairments: “mental retardation, hearing impairments . . . , speech or language impairments . . . , serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”

Because doctors, therapists, and other professionals who diagnose disabilities oftentimes do not refer to disorders in the same language as the categories the IDEA provides, educators must attempt to “fit” professional diagnoses within the categories provided under the IDEA when they initially identify a child for special education services.

Additionally, to fall under the IDEA, the identified disability must actually create a need for special education and services. In other words, the impairment itself must create a clear adverse effect on the child’s academic achievement to trigger IDEA protections and services.

For children ages three through nine, the definition of “child with a disability” under the IDEA is slightly different. At those early ages, state and local education agencies have discretion to include children who experience impairments beyond the general list, including developmental delays, as defined by the state, in one or more of the following areas: “physical development; cognitive development; communication development; social or emotional development; or adaptive development.” Again, the developmental delay must mandate the child’s need for special education and related services.

Case law has analyzed disorders that fall within each category under the IDEA, including specific diseases and disorders that have been “approved” by courts to support a student’s disability claim. For instance, courts have held that chronic fatigue syndrome and fibromyalgia are ailments sufficient to qualify a student as a “child with a disability” under the IDEA. In one New York case, a “serious emotional disturbance,” as defined by state and federal regulations, was
enough to qualify a student with a disability under the IDEA.\textsuperscript{34} Other courts have held that orthopedic impairments that accompany cerebral palsy constitute a disability under the IDEA.\textsuperscript{35} Additionally, a student in Illinois, although performing at an age appropriate educational level, was found to be a “child with a disability” because his speech impairment was severe enough to affect his educational performance and overall ability to communicate.\textsuperscript{36}

Additionally, courts have found students who performed well in school entitled to the protections and services offered under IDEA. For example, a student with an Intelligence Quotient (IQ) of 130, ranked in the “very superior” range of intelligence, was found to qualify as a “child with a disability” because of regular uncontrollable seizures that sometimes impaired his academic success.\textsuperscript{37} Similarly, a child with Asperger’s syndrome was a “child with a disability” even though she excelled academically, because Maine regulations considered social interactions related to educational performance, and the disorder caused the child to withdraw from her peers and mutilate herself during school hours.\textsuperscript{38} Thus, regardless of the child’s achievement, it is the way her disability affects her individualized aptitude that qualifies her for protection under the IDEA.\textsuperscript{39}

The IDEA mandates that public schools are responsible for identification of students’ disabilities, referred to as “child find” provisions.\textsuperscript{40} In relevant part, the “child find” provision of the IDEA states that:

\begin{quote}
All children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.\textsuperscript{41}
\end{quote}

This article is most concerned with the Response to Intervention (RTI) method of identifying a student’s specific learning disability.\textsuperscript{42} The RTI method

\textsuperscript{34} Muller \textit{ex rel.} Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 (2d Cir. 1998).
\textsuperscript{35} See Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996).
\textsuperscript{38} Mr. I v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 17-23 (1st Cir. 2007).
\textsuperscript{39} 34 C.F.R. § 300.541 (2006).
\textsuperscript{40} See 20 U.S.C. § 1412(a)(3) (2006); see also 20 U.S.C. § 1414(a)(1)(A) (2006) (“A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.”).
\textsuperscript{42} See Hensel, \textit{supra} note 9, at 685-86.
involves a longitudinal study of an at-risk student’s specific learning disability (LD).\textsuperscript{43}

Much of RTI assessment involves progress monitoring.\textsuperscript{44} It involves “tiers” of intervention.\textsuperscript{45} In other words, the teacher starts with the least intense form of intervention, such as getting the parent involved in monitoring the student’s work at home or spending a few extra minutes working one-on-one with that student during class activities that involve the area of suspected disability.\textsuperscript{46} After a period of several weeks, progress data is recorded.\textsuperscript{47} If the data indicates that the student has not responded to the intervention, the teacher moves to the next intervention “tier” and intensifies instruction.\textsuperscript{48}

Some schools follow a specific “tiered” plan for every student,\textsuperscript{49} whereas other schools let the teacher decide the appropriate levels of intervention. The second tier may involve reducing the number of homework problems assigned and providing after school help to complete the assigned problems, or it may involve working with the student on specific reading strategies like summarizing or paraphrasing. After working at the second tier for several weeks, progress data is again recorded.\textsuperscript{50} If the student still has not responded to intervention, the teacher and student move to a third tier of intense intervention, which may involve collaboration with a special education teacher or resource teacher in the area of suspected disability.\textsuperscript{51} Progress data is again recorded, and, if the student is still not responding, the teacher and student move to the most intense intervention tier.\textsuperscript{52} Because schools use RTIs to identify disabilities, 15% of the budget can be allocated to RTIs.\textsuperscript{53}

Once a child’s disability is identified, a team of educational experts – teachers, administrators, school counselors and psychologists, special education coordinators and experts, and the child’s parents – create an Individual Education Plan (IEP) for the child.\textsuperscript{54} An IEP lays out the specific


\textsuperscript{45} Id. at 94.


\textsuperscript{47} See id.

\textsuperscript{48} See id.

\textsuperscript{49} See Fuchs & Fuchs, \textit{supra} note 44, at 95.

\textsuperscript{50} See RTI Action Network, \textit{supra} note 46.

\textsuperscript{51} See Fuchs & Fuchs, \textit{supra} note 44, at 94.

\textsuperscript{52} See RTI Action Network, \textit{supra} note 46.

\textsuperscript{53} See Fuchs & Fuchs, \textit{supra} note 44, at 93.

accommodations and specialized instruction that the school district will implement to help the child reach her individual educational goals. Through IDEA, the federal government provides some funding to states, which is then allocated to individual districts, to assist with paying for the specialized provisions for each child with an IEP.

B. Limits of Coverage

While the IDEA accommodates students who need specialized instruction because of their disabilities, courts have distinguished impairments that do not fit within the IDEA because the impairment does not constitute the cause of the child’s inability to attain her potential aptitude. For instance, in 2008 an Illinois court held that a student with diabetes mellitus, adjustment disorder, and social anxiety disorder was not a “child with a disability” under the IDEA because the reasons for the student’s poor educational performance proved to be her poor attendance and neglect of make-up work, rather than her disabilities. Similarly, a Texas court held that a child with attention deficit disorder (ADD) was not a “child with a disability” under the IDEA because he skipped class, failed to attempt homework, used marijuana, and did not take his prescribed ADD medication, all factors that inhibited his educational success more than the ADD itself.

The ADA, via Section 504, protects some students who are not otherwise protected by the IDEA. While the IDEA provides specific assistance and protection geared toward ensuring a FAPE, Section 504 instead focuses on the civil rights of Americans with disabilities who access federally funded programs or institutions. Protection under the ADA and Section 504 is broader than under the IDEA because Congress’s articulated purpose under Section 504 is “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.” Therefore, Congress articulated broader protection under these laws, going beyond educational contexts. Section 504 states:

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter . . . shall be carried out

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55. Id.
58. Id. at 1084-85.
61. See id. at § 701.
62. Id. at § 701(b)(1).
63. Id.
in a manner consistent with the principles of (1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities; (2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals; (3) inclusion, integration, and full participation of the individuals; (4) support for the involvement of an individual’s representative if an individual with a disability requests, desires, or needs such support; and (5) support for individual and systemic advocacy and community involvement.64

Thus, Section 504 sets forth a general policy of inclusiveness for publicly funded programs and articulates the federal government’s general policy of accommodating people with disabilities.65 However, how those accommodations will be funded is minimally addressed.66 Therefore, public schools that receive state and federal funding must adhere to the policy of accommodating students with disabilities, but unlike under the IDEA, they do not necessarily receive directed resources to do so.67

The purposes of the ADAAA are even more direct. Congress states that its four purposes are:

(1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Like Section 504, the ADA contains no built-in funding scheme for ensuring resources to pay for the mandate.68

Often a student who does not qualify as a “child with a disability” under the IDEA can still find protection under Section 504 to obtain assistance to

64. Id. at § 701(c).
65. Id.
68. 42 U.S.C.A. § 12101(b) (West 2008).
accomplish educational tasks the disability would otherwise impair.\textsuperscript{70} Much like the creation of an IEP for a student with special education needs under IDEA, a student who has a “disability” as defined under the ADA is often provided with a “504 plan” that sets forth educational modifications for accommodating the student’s disability.\textsuperscript{71}

One of the biggest changes resulting from the enactment of the ADAAA was in defining “disability.”\textsuperscript{72} While the plain language of the definition from the ADA has not changed, other provisions of the ADAAA expand the scope of the term. Under the ADA, a “disability” is defined as: “with respect to an individual – a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”\textsuperscript{73} With regard to defining disability, the new rules of construction under the ADAAA provide:

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as – (I) medication, medical supplies, equipment, or appliances, low-vision devices, . . . prosthetics, . . . hearing aids and cochlear implants, . . . mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) \textit{reasonable accommodations} or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.\textsuperscript{74}

This prohibition on considering mitigating measures under the ADAAA will broaden coverage for many individuals.\textsuperscript{75} These new rules of construction will loosen courts’ initial determinations of whether a protected disability exists.\textsuperscript{76} In fact, Congress specifically noted in the ADAAA that “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter,” thus lowering the threshold determination as to whether a disability exists, and turning the focus to whether the school actually discriminated against an individual because of a disability by failing to offer a reasonable accommodation.\textsuperscript{77}

\begin{itemize}
  \item \textsuperscript{70} U.S. Dep’t of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, \textit{supra} note 67.
  \item \textsuperscript{72} See \textit{42 U.S.C.A.} § 12102 (West 2008); see also Wilson & Krulewicz, \textit{supra} note 17, at 37-38.
  \item \textsuperscript{73} \textit{42 U.S.C.A.} § 12102(1) (West 2008).
  \item \textsuperscript{74} \textit{42 U.S.C.A.} § 12102(4)(E)(i) (West 2008) (emphasis added).
  \item \textsuperscript{75} U.S. Dep’t of Educ., Protecting Students with Disabilities, Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, \textit{supra} note 67.
  \item \textsuperscript{76} \textit{42 U.S.C.A.} § 12102(4) (West 2008).
  \item \textsuperscript{77} \textit{Id. at} § 12102(4)(A).
\end{itemize}
C. A Cross-Section of Cases: The K-12 Disability & Reasonable Accommodation Analysis

In the education setting, ADA claims are uncommon because students with the most obvious or severe disabilities are protected under the IDEA. In the mid-1990s, however, a series of education cases involving ADA claims were decided. These cases provide a cross-section of K-12 claims, illustrating pre-amendment ADA claims in the education setting and focusing on a two-part inquiry as to the existence of a disability and whether the school made reasonable accommodations. These cases are representative of the type of issues that will emerge in the wake of the ADAAA.

1. Kindercare and the Undue Burden

In 1996, the Eighth Circuit examined the reasonableness of an accommodation requested for a four-year-old with disabilities. The child’s parents intended to enroll the child in Kindercare day care services. Brandon, the four-year-old child, was developmentally delayed, suffered from seizures, was diagnosed with attention-deficit hyperactivity disorder (ADHD), and had a “tendency to commit self-injurious acts and to run away.” There was no question that Brandon qualified as a disabled individual under both the ADA and the IDEA definitions. The IDEA and its protections eliminated the question of defining disability because the child’s IEP served as a record of his disability. His IEP required a continuous personal care attendant (PCA), funded by Brandon’s Medicaid for up to thirty hours per week, to provide one-on-one care for him. When Brandon’s mother attempted to enroll him full-time at the local Kindercare Learning Center, forty to fifty hours per week, the director agreed to accept Brandon for the thirty hours a week when a PCA was provided, but not for any time when a PCA was not available. In other words, the center refused to hire someone to supplement Brandon’s one-on-one PCA. The court held that the requested accommodation – that the center provide a one-on-one aide to the student – was not “reasonable” within the meaning of the ADA.
Title III of the ADA, which applies to private services such as the day care center involved here, prohibited discrimination against any individual “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” The court determined that daycare centers, such as the Kindercare Center in this case, were public accommodations under Title III of the ADA, and therefore that they must:

[E]nsure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the . . . service[s] . . . being offered or would result in an undue burden.

The important language in the quoted statute is the two exemptions for public accommodations: the undue burden and the fundamental alterations of the nature of the service.

In Kindercare, the court specifically examined the burden imposed on the day care center if it were required to provide a one-on-one PCA for Brandon. 28 C.F.R. §36.104 provided some guidelines:

Significant difficulty or expense in making an accommodation constitutes an undue burden. . . . To determine whether a burden is undue, we consider (1) the nature and cost of the action; (2) the financial resources of the site involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative and financial relationship of the site to the corporation; (4) if applicable, the overall financial resources of the parent corporation and the number of facilities; and (5) if applicable, the type of operation of the parent corporation.

Kindercare paid full-time aides an estimated $200 per week, and a child of Brandon’s age paid only $105 per week in tuition, meaning that Brandon’s requested accommodation would result in a net loss to Kindercare of about $95 per week. The court found that because the Kindercare had a monthly operating budget of only $9,600, providing a full-time aide to Brandon would

89. 42 U.S.C.A. § 12182(a) (West 2008).
90. Kindercare, 86 F.3d at 846 (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).
92. Kindercare, 86 F.3d at 846.
93. Id. (citing 28 C.F.R. § 36.104).
94. Id.
amount to a substantial financial burden on the center. Therefore, Brandon’s requested accommodation was not reasonable under the ADA.

2. Elementary School, Ritalin, and Reasonable Accommodations

A year after the Eighth Circuit’s decision in Kindercare, it heard a case involving the administration of Ritalin to an elementary school student. Shane, the plaintiff, was prescribed a daily dosage of 360 milligrams of Ritalin to treat his ADHD, 120 milligrams of which was to be administered during the school day. The school nurse at Shane’s elementary school administered the school day dosage for over a year before she expressed concerns to Shane’s parents that the dosage was not in compliance with the recommended maximum of sixty milligrams in the Physician’s Desk Reference. Shane’s parents provided another doctor’s opinion stating that the prescribed amount was not harmful to Shane, but the school nurse notified Shane’s parents that she would no longer administer the medication. “According to the district’s policy on medication procedures, the school nurse has the right and obligation to question and verify potentially inappropriate prescriptions and ‘to refuse to give any medication . . . .’” As an accommodation for the school’s refusal to administer Shane’s medication, the district offered to allow one of Shane’s parents, or someone designated by them, to come to the school to give Shane the medicine each day.

The court held that the district’s refusal to administer Ritalin did not violate either the ADA or Section 504 because allowing parents to give children medication during the school day was a reasonable accommodation. Under the ADA at the time of the Davis decision, and under Section 504, a plaintiff claiming discrimination had to show that he was a qualified individual with a disability and that he was denied the benefits of a program, activity, or service by reason of that disability. Although it was clear that Shane suffered from a disability, for which he took daily medication, the court held that the Davises could not “show that the district’s policy [was] discriminatory because it ‘applie[d] to all students regardless of disability’ and rest[ed] on concerns ‘unrelated to disabilities or misperceptions about them.’” The court reasoned that because the district’s refusal to administer the Ritalin was based on a

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95. Id.
96. Id. at 847.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Davis, 138 F.3d at 757.
104. Id. at 756 (referencing 42 U.S.C. § 12123; 29 U.S.C. § 794(a)).
105. Id. (citing DeBord v. Bd. of Educ., 126 F.3d 1102, 1105 (8th Cir. 1997)).
conflict about the dosage of medicine rather than a conflict about Shane’s disability, the district policy itself did not deny services to Shane on the basis of his disability. 106

Under Section 504, reasonable accommodations may be required when a student with a disability is denied access to a service.107 The ADA regulations expand upon the reasonable accommodation requirement by mandating such accommodations when necessary to avoid discrimination on the basis of disability.108 Again, programs, activities or services are exempted from changing their policies when “doing so would fundamentally alter the nature of the service” or “would create undue financial and administrative burdens.”109 The court found that, in this case, waiving the drug administration policy would impose undue financial and administrative burdens on the district because it would be required to determine the safety of dosages, the medication’s potential harms, and the district’s own liability in each case where a student was to receive medication at school, rather than allowing the school nurse to exercise discretion as to whether the dosage was safe.110 The court determined that “[b]y offering an alternative arrangement the district did not prevent Shane from receiving his medication and reasonably accommodated his disability as a matter of law.”111

3. A Middle School Student’s ADHD and ODD Are Too Disruptive to Be Accommodated

In 1998 the First Circuit heard a case involving the indefinite suspension of a middle school student with a disability from a private school when the student repeatedly violated school codes of discipline and proper behavior.112 Jason, the student in this case, attended the same school from pre-kindergarten until he was suspended from the sixth grade.113 It was not until after filing a lawsuit against the school that his parents indicated that Jason suffered from ADHD, although roughly a month before the filing of the lawsuit Jason’s psychologist diagnosed him with ADHD, as well as with oppositional defiance disorder (ODD) and childhood depression.114 Jason’s behavior had become so problematic that he completely disrupted the teaching and learning process in any classroom in which he was present.115 The school previously made several attempts to

106. Id.
107. Id. at 756 (referencing Alexander v. Choate, 469 U.S. 287, 301-02 (1985)).
108. Id. at 756-57.
109. Davis, 138 F.3d at 756 (referencing 28 C.F.R. § 35.130(b)(7)).
110. Id. at 757.
111. Id. at 757 (referencing DeBord v. Bd. of Educ., 126 F.3d 1102, 1105-06 (8th Cir. 1997)).
113. Id. at 145.
114. Id.
115. Id.
accommodate and treat Jason’s behavior, including making minor exceptions to
the school discipline code in several instances.\textsuperscript{116}

After Jason was suspended indefinitely, his parents sued the school under
the ADA and Section 504, but because the school did not receive public funding,
the Section 504 claim was dropped.\textsuperscript{117} However, the court of appeals noted that
the ADA and Section 504 claims were similar and imposed “parallel
requirements.”\textsuperscript{118} While the lower court granted an injunction ordering the
school to readmit Jason for the remainder of his sixth grade year and later
extended that injunction to include enrollment for Jason’s seventh grade year,\textsuperscript{119}
the court of appeals reversed, holding that Jason’s parents did not meet their
burden of showing that Jason was “otherwise qualified” to meet the disciplinary
requirements with reasonable accommodations because the school’s code of
conduct was an integral aspect of a productive learning environment.\textsuperscript{120} The
court of appeals also found that Jason’s parents did not meet their burden of
showing that Jason suffered a substantial limitation in a major life activity;
therefore, he was not disabled under the definitions then employed by the
ADA.\textsuperscript{121} In other words, the First Circuit held that the parents’ request that their
child be exempted from the normal operation of his school’s disciplinary code
was not reasonable under the ADA.\textsuperscript{122}

4. A High School Athlete with ADHD Held Back One Year Not Allowed to
Play Ball

In 1997 the Sixth Circuit heard a case involving a high school athlete with
ADHD attending a public school in Michigan.\textsuperscript{123} Dion, the student and plaintiff,
attended his public high school for more than eight semesters, as he had to repeat
the eleventh grade.\textsuperscript{124} The school was a part of the Michigan High School
Athletic Association (MHSA), which governed eligibility for players at member
public and private schools.\textsuperscript{125} While Dion was repeating eleventh grade, he was
diagnosed with ADHD, a specific learning disability which was determined to be
the cause of his retention.\textsuperscript{126} During Dion’s senior year, he attempted to play
basketball at his school, but was refused eligibility because of a MHSA rule that

\begin{itemize}
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Bercovitch, 133 F.3d at 151 n.13 (“For present purposes, we treat the ADA and the
    Rehabilitation Act as imposing parallel requirements… § 504 of the Rehabilitation Act ‘is
    interpreted substantially identically to the ADA.’” (citations omitted)).
  \item \textsuperscript{119} Id. at 144.
  \item \textsuperscript{120} Id. at 154-55.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id. at 145.
  \item \textsuperscript{123} McPherson v. Mich. High Sch. Athletic Ass’n, 119 F.3d 453 (6th Cir. 1997).
  \item \textsuperscript{124} Id. at 456.
  \item \textsuperscript{125} Id. at 455.
  \item \textsuperscript{126} Id. at 456.
\end{itemize}
prohibited students from participating in high school athletics beyond their eighth semester enrolled in high school.\textsuperscript{127} The association’s reason for the eight-semester eligibility rule was that it “creates a fair sense of competition by limiting the level of athletic experience and skill of the players in order to create a more even playing field for the competitors.”\textsuperscript{128}

Dion claimed that the rule discriminated against him because of his learning disability and sued under both the ADA and Section 504.\textsuperscript{129} The district court issued an injunction that allowed Dion to play basketball during his senior year, but the court of appeals later concluded that he had “no possibility of success on the merits of his ADA or Rehabilitation Act claims,” and overruled the district court’s decision.\textsuperscript{130} The court of appeals held that the eight semester eligibility rule did not violate Section 504 or the ADA.\textsuperscript{131}

The issue at the appellate level was again whether requiring the athletic association to waive the eight-semester eligibility requirement for Dion would “impose undue financial and administrative burdens or require a fundamental alteration in the nature of the program.”\textsuperscript{132} The court found that both undue burden and fundamental alterations would make a waiver an unreasonable accommodation because a “waiver of the age restriction fundamentally alters the sports program,” and it was impossible to consider on a case by case basis the physical maturity and athletic skill of every learning disabled student who requested a waiver of the eligibility rule.\textsuperscript{133}

D. Forest Grove and Private School Reimbursement under the IDEA

While the four cases above illustrate the traditional analysis of an ADA claim, the recent Supreme Court decision in \textit{Forest Grove School District v. T.A.} provides a new precedent for evaluating reimbursement to parents for private school education when they unilaterally remove their children from public schools they believe are not in compliance with the IDEA.\textsuperscript{134}

T.A. attended public schools in the Forest Grove District from kindergarten through eleventh grade.\textsuperscript{135} T.A.’s kindergarten through eighth grade teachers noticed he had trouble paying attention in class and completing homework.\textsuperscript{136} In ninth grade, T.A.’s mother contacted the school to discuss T.A.’s problems, and T.A. was subsequently evaluated by the school psychologist, who determined

\begin{itemize}
    \item \textsuperscript{127} \textit{Id.} at 455-56.
    \item \textsuperscript{128} \textit{Id.} at 456-57.
    \item \textsuperscript{129} \textit{McPherson,} 119 F.3d at 459.
    \item \textsuperscript{130} \textit{Id.} (emphasis in original).
    \item \textsuperscript{131} \textit{Id.} at 455.
    \item \textsuperscript{132} \textit{Id.} at 461.
    \item \textsuperscript{133} \textit{Id.} at 462.
    \item \textsuperscript{134} See \textit{Forest Grove Sch. Dist. v. T.A.}, 129 S. Ct. 2484, 2496 (2009).
    \item \textsuperscript{135} \textit{Id.} at 2488.
    \item \textsuperscript{136} \textit{Id.}
T.A. did not need testing for ADHD.137 T.A.’s parents did not seek review of the decision at the time.138 In T.A.’s second semester of his eleventh grade year, his parents sought professional advice; soon thereafter T.A. was diagnosed with ADHD and other disabilities related to learning and memory.139 T.A.’s parents enrolled him in a private academy for educating children with special needs, but did not notify the school district until four days after his new placement, and soon thereafter requested a hearing regarding T.A.’s eligibility for special education.140 Between T.A.’s eleventh and twelfth grade years, the Forest Grove District’s school psychologist evaluated T.A. again and concluded that the ADHD did not have a significant adverse impact on T.A.’s educational performance. As a result of the conclusions drawn by school administrators, the district declined to provide an IEP for T.A.141 Nevertheless, for his twelfth grade year, T.A.’s parents left him enrolled in the private school.142 T.A.’s parents requested an administrative hearing, and the hearing officer determined that T.A.’s ADHD did adversely affect his educational performance, that the district failed to identify him pursuant to child find provisions of the IDEA, and that the district must reimburse T.A.’s parents for the cost of his private education.143 When the school district sought judicial review, the district court held that “[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities,’ the facts of this case do not support equitable relief.”144 However, on appeal, the Ninth Circuit reversed the district court’s holding, finding that the IDEA does not impose a categorical bar to reimbursement when a parent unilaterally places in private school a child who has not previously received special education services through the public school.145

The issue before the Supreme Court was whether the IDEA categorically prohibits reimbursement for private education costs if a child has not “previously received special education and related services under the authority of a public

137. Id.
138. Id.
139. Id.
140. Forest Grove, 129 S. Ct. at 2488.
141. Id. at 2488-89.
142. Id. at 2489.
143. Id. The primary determination of deficiency as it relates to the provisions of IDEA was the school’s failure to offer a FAPE to a disabled student, particularly in light of the Court’s prior decision in Burlington. Id. at 2495.
144. Id.
145. Id. at 2495. Prior to the 1997 amendments to IDEA, the provision was silent on the issue of private school reimbursement, yet courts permitted reimbursement to occur under the principles of equity in accordance with 20 U.S.C. § 1415(i)(2)(C). Congress specifically addressed the issue in 20 U.S.C. § 1412 (a)(10)(C) that provided the remedy of reimbursement for parents that relocated students in order to accommodate a disability.
The Court held that the IDEA authorizes reimbursement for the cost of private special education services when “a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.” The Court determined that a public school district is required to reimburse parents who unilaterally removed students with suspected disabilities from public schools when: (1) the district failed to provide a FAPE; and (2) the private placement was appropriate. Even then, the court or hearing officer has discretion to determine whether the private placement was appropriate, and it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child. Thus, Forest Grove is an important decision in terms of public schools’ liabilities to children with disabilities, especially unidentified or subtle disabilities that may be encompassed in the broader definition of the term under the ADAAA.

III. ANALYSIS

In each of the five cases above, the courts’ analysis began with whether the student was “disabled” under the legal definition. Before the court would consider whether the school had made a reasonable accommodation in each student’s circumstance, each student’s unique disability was examined thoroughly. With the ADAAA’s broader definition of disability, the emphasis on fitting a unique disability into a pre-conceived ADA or IDEA definition will all but vanish, and the court’s analysis will focus on whether discrimination occurred because of failure to implement a reasonable accommodation.

The shift presents unique challenges in the public school setting because, as discussed below, the analysis under the ADAAA begins to intrude on the IDEA’s child find requirements, specifically the RTI method of identifying a

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146. *Forest Grove*, 129 S. Ct. at 2488.
147. *Id.* at 2496.
148. *Id.* Lower courts have relied upon the *Forest Grove* decision to support broad determinations granting equitable relief to parents seeking educational opportunities for their children. *See* Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175, 1183 (9th Cir. 2009); Blake C. *ex rel.* Tina F. v. Dept. of Educ., 593 F. Supp. 2d 1199, 1208 (D. Haw. 2009).
149. *Forest Grove*, 129 S. Ct. at 2496.
150. 42 U.S.C.A. § 12102 (West 2008). *See* H.R. REP. NO. 101-485(II), at 51 (1990) (emphasizing the list of possible “disabilities” is too large to establish an exhaustive list, but rather legislation should be inclusive to encompass all disabilities).
153. *Forest Grove*, 129 S. Ct. at 2491; *Davis*, 138 F.3d at 756; *Bercovitch*, 133 F.3d at 143; *McPherson*, 119 F.3d at 459-60; *Kindercare*, 86 F.3d at 845.
child’s specific learning disability. The Supreme Court’s decision in *Forest Grove* further complicates identification procedures in schools because parents can unilaterally pull their children from public schools and seek reimbursement for private school education, or elect to sue under the ADA without regard for whether the school has had a real chance to reasonably accommodate the students’ needs.

### A. Defining and Proving a Disability Under Section 504

Definitions of disability have previously collided in the education setting. For example, in *Bowers v. National Collegiate Athletic Association*, a college applicant was classified under the IDEA as having a “perceptual impairment,” and he received special education services under his IEP. However, the court found that such classification did not establish a “record” of disability for the purposes of an ADA claim. Under the new amendments, however, a “record” of disability would most certainly be established by the existence of an IEP.

Remember Brandon, the student in *Kindercare* who was identified under the IDEA as developmentally delayed. Although the *Kindercare* court began its analysis by defining disability under the ADA, it quickly concluded that Brandon’s IEP served as a record of a disability even without documentation.

In the school setting, disabilities such as ADHD, ODD, childhood depression, and specific learning disabilities are often difficult to diagnose because they often manifest as symptoms such as erratic behavior, inconsistent achievement on school assignments, and mood swings, all of which are arguably just characteristics of adolescence. Therefore, a court’s attempt to fit symptoms of a disorder into Congress’s legal definition proves difficult unless there is some “record of disability,” oftentimes in the form of an IEP or a doctor’s diagnosis.

Courts have struggled in the past to fit less obvious disabilities within the ADA definition. The petitioners from *Davis*, *Bercovitch*, and *McPherson* each had “subtle” disabilities that manifested through behaviors rather than through obvious physical deficiencies; therefore the courts meticulously analyzed the disabilities under the ADA definition.

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155. *Id.*
157. *Id.* at 531.
158. *Id.* at 532.
159. *See 42 U.S.C.A. § 12102 (West 2008).*
161. *Id.* at 846.
Before the ADAAA, terms such as “major life activity” and “substantially limits” were vague concepts with which courts struggled in the employment context, but these terms are now made clearer for both the employment and educational contexts.\textsuperscript{163} According to the ADAAA, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”\textsuperscript{164} In other words, in the educational setting there is no longer a question whether learning, reading, concentrating, thinking, and communicating are major life activities, and therefore defining a student’s impairment as a disability has become a much simpler task.

While the definition of disability technically remains the same, the definitions of associated terms have broadened, opening the door for protection of more students with ADA claims.\textsuperscript{165} To further expand the definition, the new amendments now expressly state that “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”\textsuperscript{166} Furthermore, the new amendments state that “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the [ADAAA]” to promote a Federal policy against discrimination on the basis of disability.\textsuperscript{167}

Therefore the student with ADHD who disrupts class, as in Bercovitch, or the student who needs medication to learn, as in Davis, need not prove that communicating and learning are major life activities under the new ADA because the new definitions already account for such activities.\textsuperscript{168} In Bercovitch, while agreeing that learning is a major life activity,\textsuperscript{169} the court still refused to hold that Jason’s ADHD substantially limited the major life activity of learning because his grades did not seem to suffer as a result of the disorder.\textsuperscript{170} Under the 2008 ADA amendments, Jason would have greater protection because his ADHD did affect his concentration, thinking, and communication, all of which are now explicitly listed as major life activities.\textsuperscript{171} His inability to work with peers or to communicate appropriately with his teachers and authority figures

\begin{itemize}
  \item \textsuperscript{163} 42 U.S.C.A. § 12102 (West 2008).
  \item \textsuperscript{164}  Id. at § 12102(2)(A)(1).
  \item \textsuperscript{165}  Id. at § 12102.
  \item \textsuperscript{166}  Id. at § 12102(4)(A).
  \item \textsuperscript{167}  Id. at § 12102(4)(E) (West 2008).
  \item \textsuperscript{168}  See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998); see also 42 U.S.C.A. § 12102 (West 2008).
  \item \textsuperscript{169}  Bercovitch, 133 F.3d at 155.
  \item \textsuperscript{170}  Id.
  \item \textsuperscript{171}  42 U.S.C.A. § 12102(4)(E) (West 2008).
\end{itemize}
certainly substantially limited the pragmatic aspect of his communication, while his inability to concentrate affected his thinking.\textsuperscript{172}

Under the ADAAA, students still must establish a nexus between their disability and subsequent discrimination.\textsuperscript{173} As in Bercovitch, Jason’s behaviors were a manifestation of his disabilities, and his behaviors were exactly the reason the school chose to suspend and eventually expel him.\textsuperscript{174} Thus, he would still establish the necessary nexus.

At the same time, the ADAAA would eliminate a discussion of medication or accommodations provided to the students to ameliorate the effects of their disabilities. Take away Shane’s medication, the ameliorating element of Shane’s ADHD in Davis, and the school is still left with a child with a disability who is denied the service of administration of medication from the public school nurse.\textsuperscript{175} Take away Jason’s behavioral accommodations in Bercovitch, and Jason is still a student with a disability who is denied access to the school because of that disability.\textsuperscript{176} In fact, the new rules of construction under the ADAAA eliminate consideration of any reasonable accommodation the school may already be providing for a student in the determination of whether a disability exists.\textsuperscript{177}

The elimination of this consideration is where the ADAAA collides somewhat with child find provisions of the IDEA.\textsuperscript{178} Schools that employ RTI methods for identifying specific learning disabilities in reading or in math spend weeks or months implementing and documenting the results of many different types of accommodations for the student’s suspected disability. Therefore, while a public school attempts to identify a student’s disability under child find provisions of the IDEA, especially when employing RTI methods of identification, the school creates a record of disability and is left with no practical option to avoid intervening ADA liability, but to create a “504 plan” for the student for the duration of the identification period. Even still, during the RTI identification period, under Forest Grove, schools risk liability for reimbursement if the student’s parents unilaterally place the student in an appropriate private setting.\textsuperscript{179}

\begin{footnotes}
\item[172] See Bercovitch, 133 F.3d 141; see also Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) (“[C]oncentration is not itself a major life activity. Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an ‘activity’ itself.”).
\item[173] Davis, 138 F.3d 754; Bercovitch, 133 F.3d at 141; McPherson v. Mich. High Sch. Athletic Ass’n, 119 F.3d 453 (6th Cir. 1997).
\item[174] Bercovitch, 133 F.3d at 152.
\item[175] Davis, 138 F.3d at 756.
\item[176] Bercovitch, 133 F.3d at 156.
\item[177] See 42 U.S.C.A. § 12201(h) (West 2008).
\end{footnotes}
B. Discrimination or Reasonable Accommodations under the ADAAA

With the ADAAA, less emphasis will be placed on determining whether a disability exists, instead shifting the focus toward determining whether a student has been discriminated against because of that disability.\(^{180}\) Naturally, the analysis of that discrimination in the school setting involves a determination of whether reasonable accommodations were made for the student’s disability, or if he or she was denied appropriate educational services because of a lack of reasonable accommodation.\(^{181}\) The shift toward analyzing reasonable accommodation will undoubtedly still involve a determination of public versus private accommodations, undue burdens, and fundamental alterations in policies, thus creating new challenges for administrators to work through in the public school setting.

1. Discrimination: Public vs. Private Schools and Who Is “Otherwise Qualified”

A significant difference between the ADA and Section 504 of the Rehabilitation Act exists in the plain language of the acts. Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .”\(^{182}\) Title II of the ADA, which covers public services like schools, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”\(^{183}\)

The similarities in the statutes are obvious, but it is also difficult to ignore the absence of the “otherwise qualified” language in the ADA provision. As Section 504 is distinguished by the fact that it applies to public accommodations receiving federal funding, the specific language of Section 504 includes protections only for plaintiffs with disabilities who are otherwise qualified to participate in the services offered by the institution.\(^{184}\) In essence, Section 504 applies protections to students in public schools, but not to students in private schools that do not receive federal funds.\(^{185}\) Therefore, in *Kindercare* and

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180. See Hensel, *supra* note 9, at 654 (“The statute’s antidiscrimination focus is reinforced by the bill’s direction to courts to give ‘primary . . . attention . . . [to] whether entities covered under the ADA have complied with their obligations.’”).
Bercovitch, the private schools involved did not have to comply with Section 504,\(^\text{186}\) while the public schools in Davis and McPherson did.\(^\text{187}\) However, the ADA provides protections in the private school setting that Section 504 would otherwise omit.\(^\text{188}\) The court in Bercovitch addressed the “otherwise qualified” language of the ADA, noting that the student was not otherwise qualified to attend the private school, where discipline was an important part of the school code.\(^\text{189}\) The court of appeals cited the United States Supreme Court’s decision in Se. Cmty. Coll. v. Davis to hold that “an otherwise qualified person [under Section 504] is one who is able to meet all of a program’s requirements in spite of his handicap.”\(^\text{190}\) In contrast, Title II of the ADA defines a “qualified individual with a disability” as:

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\text{[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.}\]

While the 2008 Amendments to the ADA change the language within Title I that addresses employment discrimination, there is no change to the “qualified” language in Title II, which applies to public services, such as schools.\(^\text{192}\) However, other changes in the 2008 ADA Amendments would in fact create a different analysis of who is a “qualified individual with a disability” as the language remains in Title II.\(^\text{193}\)

In Bercovitch, the court of appeals reversed the district court’s determination that Jason’s “conduct cannot be the measure of his qualification because his conduct is, to a significant extent, a manifestation of his disability.”\(^\text{194}\) The court of appeals further explained that “[a] school’s code of conduct is not superfluous to its proper operation; it is an integral aspect of a productive learning environment.”\(^\text{195}\) So in Bercovitch, as with most of the other cases discussed, the court struggled with a balance: defining the student’s disability as

\(^\text{186.} \) See Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Roberts ex rel. Rodenberg-Roberts v. Kindercare Learning Ctrs., Inc., 86 F.3d 844 (8th Cir. 1996).
\(^\text{188.} \) See O’Neill, supra note 184, at 194.
\(^\text{189.} \) Bercovitch, 133 F.3d at 154-55.
\(^\text{190.} \) Id. at 154 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979)).
\(^\text{192.} \) See Bissonnette, supra note 11, at 871.
\(^\text{193.} \) See Bissonnette, supra note 11, at 873 -874 (emphasizing that the courts will likely place more emphasis upon the analysis of the element of “reasonable accommodation” as less congressional guidance has been provided for that phrase, thus providing more opportunity for interpretation and litigation).
\(^\text{194.} \) Bercovitch, 133 F.3d at 154 (citation omitted).
\(^\text{195.} \) Id.
manifested, weighted against what types of accommodation requirements would burden or fundamentally alter the nature of the school’s services.196 The ADA Amendments create a slightly different analysis in each of these cases that reaches substantially the same conclusion as the court of appeals in Bercovitch.

2. Reasonable Accommodation: Undue Burden or Fundamental Alteration of the Nature of the Service

With the push to liberally construe the definition of an individual with a disability, the focus of an ADA claim analysis in the educational setting will surely shift to whether or not an accommodation made by a school was reasonable,197 and in turn, to whether a requested accommodation would create a fundamental alteration in the nature of the services the school provides.198 Because each of the four cases above turned primarily on the reasonable accommodation analysis, the outcomes of each would most likely not change under the ADAAA.

However, reasonableness of accommodation is a difficult question in the public school setting because a school provides access to learning, socialization, reading, and communication skills to many different students with different abilities in each of those major life activities. For a school, public or private, to say that accommodating a student’s individual abilities or disabilities is “burdensome” or an “alteration of policy” is in sharp contrast with widely accepted pedagogical theories that every student has different learning needs.199 Accommodating the needs of all students is at the heart of good teaching practices, regardless of whether a statutorily defined ability or disability exists. Dion’s specific learning disability in McPherson is a good example of the type of different learning needs individual students may have.200 His deficiencies did not eliminate him from entitlement to an education. Perhaps some accommodation of his desire to play ball could have been made. It is the same with Shane and Jason’s ADHD, which caused difficulties with concentration and thinking, and manifested in behavioral problems.201 Good educators accommodate students with ADHD by specializing instruction to meet their learning needs.202 Theoretically, the ADA is unnecessary in the public school setting because every single student is already receiving enough individual

196. Id. at 152.
197. See Bissonnette, supra note 11, at 873-74.
198. See Hensel, supra note 9, at 680.
199. U.S. Dep’t of Educ., Thirty Years of Progress in Educating Children with Disabilities through IDEA, supra note 21.
202. SANDRA F. RIEF, HOW TO REACH AND TEACH ADD/ADHD CHILDREN: PRACTICAL TECHNIQUES, STRATEGIES, AND INTERVENTIONS FOR HELPING CHILDREN WITH ATTENTION PROBLEMS AND HYPERACTIVITY 83 (2d ed. 2005).
accommodation for his or her level of ability or disability. In practice, this is most likely the reason ADA claims in the public schools setting are rare.

At the same time, at some point the financial and administrative burden on a school to provide individualized accommodations to each student outweighs the benefit to individual students. Financially and administratively, schools do not have the resources necessary to accommodate the variety and multitude of abilities or disabilities within each school, especially with looming liability for failing to accommodate borderline cases. The ADA mandates accommodation, but provides no specific mechanism to fund those accommodations. When a student has a specific learning disability, schools need more staff, training, and other resources to appropriately accommodate the disability to provide an equal education. In the public school setting, IDEA provides a funding structure to ensure that students with certain types of disabilities are accommodated and educated appropriately. In contrast, in Kindercare, the court determined that providing Brandon a one-on-one personal aid would be an undue burden for the private center without ever reaching the issue of whether the accommodation would fundamentally alter the program. If Brandon had been in a public school setting, rather than a private day care, his IEP accommodation would have been honored under the IDEA, which provides funding mechanisms for expensive accommodations such as one-on-one personal aids.

Similarly, in Bercovitch, if Jason had been in a public school setting, the IDEA would mandate that the school hold a manifestation hearing to determine if Jason’s behaviors were a result of his disability, or else lose funding eligibility. If his behaviors were a result of his disability, the school would be limited in how it could punish Jason via suspension and expulsion. Because the school was private, under the ADA the school could claim that accommodating Jason’s extreme behaviors was unreasonable in that it disrupted the strict discipline policy. Because the ADAAA maintains that a program

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207. See Bacon v. Richmond, 475 F.3d 633 (4th Cir. 2007) (funding to accommodate the disabled); see also 20 U.S.C. § 1411 (2006).
211. Id. at § 1400(d)(1)(A); see also Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998).
212. Bercovitch, 133 F.3d at 153.
213. Id.
does not have to fundamentally alter its policies to accommodate a person’s
disability, the outcome in Bercovitch would most likely also remain unchanged,
even though the focus of the analysis would shift away from a determination of
Jason’s disability.  

IV. CONCLUSION

In conclusion, with the new amendments to the ADA, where learning,
reading, concentrating, and thinking are defined as “major life activities,” and
the “substantial limitation” of those activities is to be liberally construed, schools
face new challenges in creating individualized accommodations for a greater
number of students with limited resources to do so. Furthermore, the ADAAA
begins to encroach on child find provisions of the IDEA, specifically where
schools employ RTI methods for identifying specific learning disabilities,
because such methods almost by definition generate a record of disability. The
problem is compounded by increased liability exposure in borderline cases.
Finally, one can only speculate as to the increased pressure in a time of tight
federal, state and local budgets.

214. Id.
MONKEYS AND HORSES AND FERRETS…OH MY!
NON-TRADITIONAL SERVICE ANIMALS UNDER THE ADA

Robert L. Adair*

I. INTRODUCTION

An important aspect of the Americans with Disabilities Act (ADA) involves the use of service animals by people with disabilities, but the ADA never mentions service animals. The Department of Justice (DOJ) is responsible for implementing the regulations that carry out the ADA. These regulations determine how the use of service animals is affected by the ADA.

In 1991, the DOJ issued a regulation requiring that “[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” Also in 1991, the DOJ defined “service animal” as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability.”

Since this vague regulation was first issued in 1991, the DOJ has faced a trend towards the use of “wild, exotic, or unusual species, many of which are untrained, as service animals.” In response to this trend, the DOJ proposed a new definition in June 2008 that would have limited the definition of “service animal” to “dog or other common domestic animal.” The regulation also would have specifically excluded “wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents” from being considered service animals under the ADA.

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2. Id.
5. Id.
After conducting public hearings on the issue, the DOJ proposed an even more restrictive definition in December 2008. This final proposed version sought to eliminate “other commonly domesticated animals” from the definition, allowing only service dogs to be recognized as service animals. This version did require places of public accommodation to make reasonable modifications for people with disabilities utilizing miniature horses, but expressly stated that only dogs could be defined as service animals. This would have allowed miniature horse users to go out in public with their service animals, but potentially find themselves barred from keeping the animals at home by state and local regulations. This regulation narrowly defining service animals was not adopted, as the Obama administration withdrew all pending ADA regulations until they could be evaluated by President Obama’s appointees.

Although currently on hold, this regulation and its narrow definition of a service animal may be resurrected, or a similarly restricting one may be proposed by the DOJ at any time. In proposing the species restrictions, the DOJ stated that “[t]he Department continues to receive a large number of complaints from individuals with service animals…. [M]any covered entities are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals.” The DOJ admitted that non-traditional service animals represent only a small percentage of animals used by those who rely on service animals overall, but cited “erosion of the public’s trust” and safety concerns as reasons to establish a “practical and reasonable species parameter.”

While these concerns are understandable, the reality is that such parameters are not necessary. The open-ended regulation currently in place allows individuals to use any service animal that can assist them in coping with a disability. The type of animal best suited to assist each person will vary based

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10. Skloot, supra note 9; see Nondiscrimination on the Basis of Disability, supra note 6, 73 Fed. Reg. at 34,516.
11. Skloot, supra note 9; see Nondiscrimination on the Basis of Disability, supra note 6, 73 Fed. Reg. at 34,516.
14. See Ben Leubsdorf, Tiny Horse Trains as Guide for Blind Muslim, DESERET MORNING NEWS, Apr. 12, 2009, at A08 (stating that “[t]he new ADA regulations are under review and final language will be issued later this year, according to Justice Department spokesman Alejandro Miyar”).
17. See Rebecca Skloot, Creature Comforts, N.Y. TIMES, Jan. 4, 2009, § MM (Magazine), at 34.
upon individual circumstances, and may even differ between individuals who suffer from the same disability.\(^\text{18}\) Although public safety and reasonableness must be considered, the courts have handled those concerns ably under the current open-ended regulation.\(^\text{19}\) An examination of the exotic or unusual service animals involved in litigation shows that the courts have been able to balance safety concerns against the rights of people with disabilities under the ADA and weed out unreasonable service animals, as well as those individuals who have sought to manipulate the ADA into allowing them to keep a forbidden pet.\(^\text{20}\) Furthermore, in cases where unreasonable service animals were tolerated due to fear of violating the ADA,\(^\text{21}\) the principles used in the aforementioned cases could have remedied the situation if the assistance of the courts had been sought.

This article analyzes the major cases involving non-traditional service animals. Part II looks at those species that have been viewed as potentially presenting a danger to their owners or the public, examining the use of non-human primates and snakes. Part III examines cases where people seek to pass their pets off as service animals, discussing miniature horses, ferrets, and the difference between therapy animals versus service animals. Part IV is a discussion of potential conflicts between the federal ADA and state or local laws regarding non-traditional service animals. Finally, Part V concludes that the present regulatory system is adequate and should remain in place.

II. POTENTIALLY DANGEROUS ANIMALS

Perhaps the greatest concern about people with disabilities using non-traditional service animals arises from the specter of dangerous animals. Almost everyone can agree that lions, tigers, and bears are not appropriate animals to be kept in the average home or to tramp around our towns and cities with their owners. The open-ended language in the current regulation defining a service animal as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability” does leave the door open to this possibility.\(^\text{22}\) However, an examination of the use of non-human primates as service animals shows that the courts can easily strike down any attempt to use a dangerous creature as a service animal.\(^\text{23}\)

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18. See id.
19. See id.
21. See infra Part III.B.2 (discussing a situation in which a local government settled a lawsuit that allowed a family to keep two goats in violation of local zoning regulations and a situation in which U.S. Airways allowed a 300-pound pot-bellied pig to ride in the cabin of a flight).
A. Non-Human Primates

Among people with disabilities who use non-traditional service animals, individuals who utilize non-human primates are conspicuous. An interesting example of a partnership of this type comes from 1800’s South Africa, when a baboon helped a paraplegic to keep his job. Jack “Jumper” Wide, a railway guard who lost his balance and fell under a train, lost both of his legs at the knees and struggled to continue doing his work. Wide spotted a trained baboon driving an oxwagon and became convinced that the animal could assist him. Wide persuaded the owner of the baboon to turn over the animal. The baboon’s owner warned that Wide must provide “a tot of good Cape Brandy” to the baboon each evening or the animal would pout and refuse to work the next day. Wide trained the baboon to push him to work in a trolley, change signals in the railyard, and fetch keys to the coalshed when trains gave the appropriate whistle signal. After a traveler complained that the signals in the rail yard were being changed by a baboon, the railroad dispatched investigators to the scene. Wide insisted that he and the baboon were quite capable, and the inspectors proceeded to give the animal a test, which he easily passed. For his valuable service to the railroad guard, the baboon received an employment number and was issued government rations until his death.

A more recent case involving the use of primates as service animals provides us perhaps the best example of how the courts can weed out service animals that pose a possible risk to public safety. In Pruett v. Arizona, a diabetic Arizona woman sought to override state law forbidding her to keep a chimpanzee in her home, by claiming it was her service animal. Pruett had experience in keeping unusual animals, owning a pet tree sloth and having previously used a macaque to assist with her diabetes. The macaque was able to detect changes in Pruett’s scent when her sugar levels dropped, and would bring her something sugary to

25. Id.
27. Id.
29. CHENEY & SEYFARTH, supra note 26, at 30.
31. CHENEY & SEYFARTH, supra note 26, at 31.
32. CHENEY & SEYFARTH, supra note 26, at 31.
33. du Plessis, supra note 24. Presumably, these rations included brandy each evening.
35. Id. at 1068.
eat or drink.\textsuperscript{37} After the death of her macaque in 2006, Pruett informed the Arizona Game and Fish Department (Department) that she wanted to obtain a chimpanzee to replace the macaque as her service animal.\textsuperscript{38} In June 2007, Pruett purchased a two-year-old chimpanzee in Texas and drove with it back to Arizona.\textsuperscript{39} Pruett admitted knowing at the time she purchased the chimpanzee that possession of a chimpanzee was restricted in Arizona.\textsuperscript{40}

Arizona law considers “[a]ll species of the family Pongidae of the order Primates… [e]xample common names include: orangutans, chimpanzees, gorillas” - to be restricted wildlife.\textsuperscript{41} The law states that “restricted live wildlife’ means wildlife that cannot be imported, exported, or possessed without a special license or lawful exemption.”\textsuperscript{42} Pruett sought to obtain an exemption from the Department, as well as an exhibitor license for one nonhuman primate from the United States Department of Agriculture (USDA).\textsuperscript{43} The USDA engaged in pre-licensing inspections, but ultimately declined to issue the requested license, citing a need for more information.\textsuperscript{44} The Department also denied Pruett’s request to keep the chimpanzee in her home as a service animal to assist with her diabetes in July 2007, giving her thirty days to remove the animal from the state and prove that she was no longer harboring it.\textsuperscript{45}

Pruett did not accept this directive and filed suit under the ADA in federal court, seeking a waiver of Arizona law allowing her to keep the chimpanzee.\textsuperscript{46} While both sides agreed that Pruett was a “qualified individual with a disability,”\textsuperscript{47} the United States District Court for the District of Arizona denied her request to keep the chimpanzee and granted summary judgment to the state.\textsuperscript{48} The court stated that the Department had properly followed Arizona law in refusing to grant Pruett an exception to keep her chimpanzee.\textsuperscript{49} This alone did not spell defeat, however, as the federal ADA statute can preempt a conflicting state law.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Pruett, 606 F. Supp. 2d at 1069.
\item \textsuperscript{39} Id. at 1070.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} ARIZ. ADMIN. CODE § R12-4-406(G)(4) (2009).
\item \textsuperscript{42} ARIZ. ADMIN. CODE § R12-4-401(24) (2009).
\item \textsuperscript{43} Pruett, 606 F. Supp. 2d at 1069.
\item \textsuperscript{44} Id. at 1070.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 1071.
\item \textsuperscript{47} Id. at 1076.
\item \textsuperscript{48} Id. at 1079.
\item \textsuperscript{49} Pruett, 606 F. Supp. 2d at 1076 (The Department may only grant an exception if public health and safety are not threatened, and the purpose must be “for the advancement of science, wildlife management, or promotion of public health or welfare; education; commercial photography under specific conditions; or for humane treatment of live wildlife.” (quoting ARIZ. ADMIN. CODE § R12-4-417 (2009))).
\item \textsuperscript{50} Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F. Supp. 2d 941, 952 (E.D. Wis. 1998).
\end{itemize}
The court first examined the claim that the chimpanzee was a service animal.\textsuperscript{51} Examining the regulatory definition, the court determined that the chimpanzee did not qualify, because it did not meet the standard of being individually trained for the benefit of a person with a disability.\textsuperscript{52} While acknowledging that the chimpanzee was able to fetch beverages and candy on command, the court was unimpressed.\textsuperscript{53} Considering the seriousness of Pruett’s condition, and the ability of the chimpanzee to assist her with it, the court found that keeping the chimpanzee as a service animal was “not only unnecessary, it likely is inadequate.”\textsuperscript{54} Suggesting that Pruett would have been wiser to replace her deceased service macaque with a similar animal, the court noted that the macaque was able to detect a dangerous drop in blood glucose level, summon emergency assistance if Pruett was unable to do so herself, and was permitted under Arizona law.\textsuperscript{55} In contrast, the chimpanzee was trained to bring Pruett sugar only when verbally told to do so and was unable to summon emergency services.\textsuperscript{56} The chimpanzee also was illegal to keep in Arizona without a license.\textsuperscript{57}

Had the court stopped here, a properly trained chimpanzee might someday qualify as a service animal for an individual with a qualified disability. However, the court went further and considered the effect of Pruett’s claims on the laws of Arizona.\textsuperscript{58} The ADA requires reasonable modifications on the part of a public entity, such as the Department, “unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”\textsuperscript{59} The court found that the waiver of Arizona law Pruett was seeking would constitute a fundamental alteration of Arizona’s statutes and regulations protecting its citizenry.\textsuperscript{60} Looking ahead, the court stated that “[a] bond between a human and a chimpanzee does not guarantee there will not be future aggression by the chimpanzee.”\textsuperscript{61} The court emphasized Pruett’s own acknowledgement of potential future problems, noting that:

Pruett concedes, however, that the Chimpanzee will grow to be large and strong, its behavior could be unpredictable, and chimpanzees are likely to become aggressive beginning at adolescence. Pruett acknowledges that even if she takes measures, such as castration, to

\textsuperscript{51} Pruett, 606 F. Supp. 2d at 1077.
\textsuperscript{52} Id.
\textsuperscript{53} See id.
\textsuperscript{54} Id.
\textsuperscript{55} See id. at 1078.
\textsuperscript{56} Id. at 1071.
\textsuperscript{57} See ARIZ. ADMIN. CODE §§ R12-4-401, -406 (2009).
\textsuperscript{58} Pruett, 606 F. Supp. 2d at 1078-79.
\textsuperscript{59} 28 C.F.R. § 35.130(b)(7) (2009).
\textsuperscript{60} Pruett, 606 F. Supp. 2d at 1078-79.
\textsuperscript{61} Id. at 1071.
reduce the likelihood that the Chimpanzee will become aggressive, she may not be able to control the Chimpanzee and would need to keep it in an enclosure. She also acknowledges that at some point the Chimpanzee will be too large to live in her home and be used as a service animal.

Focusing on safety, the court held that the Department could not legitimately determine that the chimpanzee did not pose a threat to Pruett and others. Even though Pruett sought to keep the chimpanzee only at home and did not seek access to a place of public accommodation, the court sided with the Department’s contention that the chimpanzee posed a potential threat to Arizonans.

Finally, the court determined that the waiver sought by Pruett was not reasonable, and thus not required under the ADA. The court stated that “[c]ourts generally will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers, but the ADA and accompanying regulations require courts to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives.” The court granted summary judgment for the Department. Perhaps more importantly, the court articulated a test that could be used in similar situations: (1) whether the modifications are necessary to prevent discrimination against a disability; (2) whether the modifications would fundamentally alter the nature of existing statutes and regulations; and (3) whether the modifications are reasonable.

While the Pruett case speculated about the potential danger in keeping a chimpanzee, this danger was illustrated by a February 2009 attack. This incident, in which a pet chimpanzee in Connecticut severely mauled a visitor to the owner’s home, received extensive media coverage. Following this attack, the Connecticut legislature introduced a bill to ban the possession of chimpanzees, as well as other animals considered to be “dangerous.” Action also followed on the federal level, with both the House and Senate considering versions of the Captive Primate Safety Act to make the interstate transport of pet

62. Id. at 1078.
63. Id.
64. Id. at 1077.
65. See id. at 1078-79.
66. Pruett, 606 F. Supp. 2d at 1079.
67. Id. (citing Crowder v. Kitagawa, 81 F.3d 1480, 1485 (9th Cir. 1996)).
68. See id.
69. Id. at 1076-77.
71. See id.
primates illegal.73 However, it is likely that the vast majority of those who utilize primates as service animals are not keeping chimpanzees or baboons.74

Since 1979, the one-of-a-kind organization, Helping Hands Monkey Helpers for the Disabled (Helping Hands), has trained capuchin monkeys to assist people with spinal cord injuries or mobility impairments.75 Spurred by an interest in ways to assist veterans who had suffered spinal injuries, Helping Hands received early support from the National Science Foundation, the Veterans Administration, and the Paralyzed Veterans of America.76 Extensive research and planning went into determining what type of monkey would be best for the program, and a training program was developed.77 Capuchin monkeys were selected due to their “size, intelligence, dexterity, curiosity and affectionate nature.”78 Today, Helping Hands operates a breeding program in partnership with a zoo, a “Monkey College,” and an educational program to educate children on avoiding spinal cord injuries.79

In spite of the $38,000 cost of raising and training each monkey, Helping Hands has been able to place over one hundred capuchins with individuals suffering from spinal cord injuries, as well as cerebral palsy, stroke, polio, and Lou Gehrig’s Disease.80 Service monkeys offer several advantages over traditional service dogs.81 Due to their greater manual dexterity, the monkeys can be trained to perform tasks such as feeding people, using a microwave oven,

73. See Captive Primate Safety Act, H.R. 80, 111th Cong. (as passed by House of Representatives, Feb. 24, 2009); Captive Primate Safety Act, S. 462, 111th Cong. (2009) (referred to the Committee on Environment and Public Works). Both versions contain an exception for the transport of a single primate of the genus Cebus (the commonly used Capuchin monkeys) “for the purpose of assisting an individual who is permanently disabled with a severe mobility impairment.”


77. Id.

78. Disabled World, supra note 75.

79. Helping Hands: Monkey Helpers For the Disabled, Our Programs, Monkey College/Training, http://www.monkeyhelpers.org/ourprograms/monkeycollege/ (last visited Jan. 17, 2010) (At the “Monkey College” in Boston, Helping Hands monkeys are trained to assist people with disabilities to perform tasks in daily life “such as opening and setting up a drink of water, providing food, picking up a dropped or out-of-reach object, or turning the pages of a book.”).

80. Disabled World, supra note 75.

and putting disks into a DVD player. These tasks would be impossible for a
dog, no matter how well-trained. Another advantage over dogs is the longevity
of the monkeys, who can serve for twenty to thirty years compared to the
average service dog working life of eight to ten years.

Despite this success story, both versions of the revised regulation proposed
in 2008 would have stripped these monkeys of their legal status as service
animals. In proposing the regulation, the DOJ cited the American Veterinary
Medical Association’s (AVMA) position statement against the use of monkeys
as service animals, which states: “The AVMA does not support the use of
nonhuman primates as assistance animals because of animal welfare concerns,
the potential for serious injury and zoonotic (animal to human disease
transmission) risks.” However, as of 2008, these monkeys could be kept as
pets in many states without even obtaining a permit, and with a permit in several
others. It is illogical to refuse to acknowledge the Helping Hands’ monkeys as
service animals for people with disabilities, when their neighbors are free to keep
the same monkeys as pets.

The legislative branch has demonstrated more support for the concept of
monkeys as service animals than the DOJ. When the House passed the Captive
Primate Safety Act in 2008, exceptions to the ban of interstate transport of
primates were crafted for veterinary purposes or for transfer to a new caregiver
for the animal if its previous owner died. Subsequently, Representative Don
Young of Alaska introduced an amended version containing another exception
for the transport of capuchin service monkeys to people with disabilities in order
to assist them with independent living. This bill was intended solely for the
benefit of Helping Hands to ensure that it “will be able to continue to transport

82. Id.; John Hilliard, Monkeys as Service Animals?, METROWEST DAILY NEWS, Apr. 11, 2004,
83. Wechsler, supra note 81.
84. Helping Hands, supra note 76. Hellion, the first service monkey placed by Helping Hands, assisted his partner for twenty-four years.
85. Richard Abshire, Service Dogs Helping Patriots and Prisoners: Female Felons Train Nonprofit’s Canines for Use by Wounded Vets, DALLAS MORNING NEWS, June 1, 2009, at 1B.
86. See Nondiscrimination on the Basis of Disability, supra note 6, 73 Fed. Reg. at 34,521; Skloot, supra note 9.
89. See, e.g., Captive Primate Safety Act, H.R. 2964, 110th Cong. § 3(a)(2)(B) (as passed by House of Representatives, June 17, 2008); accord Captive Primate Safety Act, S. 1498, 110th Cong. (as introduced in Senate, May 24, 2007).
90. Captive Primate Safety Act, H.R. 2964, 110th Cong. § 3(a)(2)(B) (as passed by House of Representatives, June 17, 2008); accord Captive Primate Safety Act, S. 1498, 110th Cong. (as introduced in Senate, May 24, 2007). This was a similar bill which failed to pass in the Senate.
its service monkeys to worthy recipients in all 50 States and U.S. territories in
the future.92 In his remarks, Representative Young particularly praised the
value of Helping Hands’ programs for disabled veterans and noted that his bill
had been endorsed by the Army Veterinary Corps.93 The amended bill did not
make it out of committee, and the original version of the bill also stalled in the
Senate.94

When the Captive Primate Safety Act was reintroduced in 2009, both the
House and Senate versions contained the language from Representative Young’s
2008 bill, which would allow Helping Hands to continue transporting capuchin
service monkeys to people with disabilities.95 This bill passed the House in
February 2009, but has not been voted on by the Senate.96 Given these
developments, it appears that there is significant support in Congress for the
recognition of Helping Hands monkeys as service animals. It would seem
counter to legislative intent for the DOJ to disallow the monkeys’ status as
service animals, while Congress considers legislation specifically permitting
their interstate transport to assist people with disabilities.

These bills also require compliance with state and local regulations
regarding both the transport and possession of the monkeys.97 As Pruett
demonstrates, state wildlife control laws need not be thrown out automatically
whenever the ADA is invoked.98 The courts and legislatures remain better
forums to determine the status of service animals and prevent abuses, rather than
a one-size-fits-all regulation imposed by Washington.

B. Snakes

A snake is another potentially dangerous animal, and at least one individual
has tried to defend using a snake as a service animal.99 In Assenberg v. Anacortes
Housing Authority, Michael Assenberg sued the Anacortes Housing
Authority (AHA) for not allowing him to keep snakes in his apartment.100
Assenberg moved in with a resident of the complex in July 2005 and joined her
on the lease.101 Soon after, another resident complained that Assenberg was
keeping snakes in his apartment.102 AHA sent Assenberg a “Notice to Comply

93. Id.
94. See H.R. 6505, supra note 91; S. 1498, supra note 90.
95. Captive Primate Safety Act, H.R. 80, 111th Cong. § 3(a)(2)(B) (as passed by House of
96. See H.R. 80, supra note 95; S. 462, supra note 95.
97. H.R. 80, supra note 95, § 3(a)(2)(B); S. 462, supra note 95, § 3(a)(2).
100. Id. at *2.
101. Id. at *1.
102. Id.
or Vacate and Notice of Intent to Evict based on plaintiffs’ violation of the pet policy, which prohibits snakes.\textsuperscript{103}

Assenberg responded, claiming “that the snakes were his service animals.”\textsuperscript{104} He provided a letter from his physician that he was depressed and the pet snakes were part of his therapy.\textsuperscript{105} According to the doctor, Assenberg “derive[d] much comfort and mental benefit from his snakes.”\textsuperscript{106} This letter did not satisfy the AHA.\textsuperscript{107} AHA reconsidered following a second letter where the physician clarified that the snakes were indeed service animals and offered further assurance of their assistance in treating Assenberg’s depression.\textsuperscript{108}

After the second letter, AHA relented and allowed Assenberg to keep the snakes as long as they did not endanger other residents or apartment staff.\textsuperscript{109} More specifically, he was required to declare the types of snakes he kept and obtain a professional opinion that they were not venomous or otherwise dangerous; keep the snakes caged when any staff members were in his apartment, or when he was transporting the snakes; and agree that AHA was not responsible for any injuries caused by the snakes.\textsuperscript{110} In his response, Assenberg stated that he owned both a gopher snake and a red tail boa, but otherwise refused to comply.\textsuperscript{111} He was insistent upon his right to have the snakes with him at all times, even when walking to the management office to pay his rent.\textsuperscript{112}

Already at an impasse over the snakes, a dispute then developed between Assenberg and the AHA over his right to cultivate and use marijuana under Washington’s state medical marijuana law.\textsuperscript{113} AHA cited both of these violations and began the process of evicting Assenberg in September.\textsuperscript{114} Assenberg contested his eviction by filing suit in state court, which AHA removed to federal court.\textsuperscript{115}

The United States District Court for the Western District of Washington granted AHA’s request for summary judgment.\textsuperscript{116} The court ruled that Assenberg had not demonstrated the snakes were necessary for his treatment\textsuperscript{117} despite additional information from his physician that the snakes served as

\textsuperscript{103.} Id.
\textsuperscript{104.} Id.
\textsuperscript{105.} Assenberg, 2006 WL 1515603, at *1. This same doctor also provided “Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State” paperwork to Assenberg. Id. at *2.
\textsuperscript{106.} Id. at *1.
\textsuperscript{107.} Id.
\textsuperscript{108.} Id.
\textsuperscript{109.} Id.
\textsuperscript{110.} Id.
\textsuperscript{111.} Assenberg, 2006 WL 1515603, at *1.
\textsuperscript{112.} Id.
\textsuperscript{113.} Id. at *2.
\textsuperscript{114.} Id.
\textsuperscript{115.} Id.
\textsuperscript{116.} Id. at *5.
\textsuperscript{117.} Assenberg, 2006 WL 1515603, at *3.
“magnets for heat” that benefited Assenberg. 118 The court also found that the snakes failed to meet the requirements of service animals, stating that Assenberg “never informed AHA that he trained the snakes or that they had any unique characteristics or abilities….119 The court suggested that AHA had already gone further than necessary in accommodating Assenberg by allowing him to keep the snakes with conditions.120 The court rejected Assenberg’s insistence on the right to carry the snakes with him at all times, again stating he had failed to prove that it would constitute a necessary accommodation.121

The danger of snakes is illustrated by the tragic death of a Florida child at the hands of a pet Burmese python in July 2009. 122 While uncommon, there have been a dozen documented snake attacks in the United States since 1980.123 In addition to possible attacks on humans, snakes pose a danger as an invasive species.124 Escaped and released pythons are a major problem in Florida’s Everglades, where they breed and prey upon native wildlife.125 Experts estimate that 150,000 non-native pythons have colonized the Everglades,126 and U.S. Geological Survey information indicates that climatic conditions would allow their spread across the southern third of the country.127 Spurred to action by the toddler’s death, Florida has begun licensing hunters to cull the animals from the Everglades.128 The federal government may also get involved, as Senator Bill Nelson had already introduced a bill in Congress to ban the importation of Burmese pythons.129

Assenberg provides another fine example of the court’s ability to restrict the unfettered use of service animals. Even if the snakes involved in this case had met the training standard, the court could still have evaluated the potential dangers involved, and possibly reached the same result. In any event, it seems unlikely that AHA would have been forced into offering any accommodations beyond what it had already offered to Assenberg.

118. Id. at *1 n.2.
119. Id. at *3.
120. Id. at *4.
121. Id.
123. Gary Pinnell, Yes, Exotic Snakes Attacks Can Happen Here, HIGHLANDS TODAY (Sebring, Fla.), July 11, 2009, available at 2009 WLNR 13227898. Not all of these attacks were fatal. See id.
124. Id.
125. Id.; see Paul Quinlan, Not So Much as a Near Hiss, PALM BEACH POST, July 22, 2009, at 1B.
126. Stopping Pythons, ST. PETERSBURG TIMES, July 20, 2009, at 10A.
III. Pets Masquerading as Service Animals

Another problem arises when people claim that their pets are service animals in order to keep an otherwise forbidden animal at their home or to gain access to places of public accommodation with the animal. As we have seen in Pruett, this issue may overlap with a situation where the animal is potentially dangerous as well. Unsurprisingly, the courts have also been called upon to settle disputes of this nature, where the danger posed by the animal is not a paramount concern. These animals have typically been ruled out due to lack of training or their owners’ lack of disability.

A. Miniature Horses

In Access Now, Inc. v. Town of Jasper, a mother (Kitchens) sought to keep a miniature horse at her home in violation of a local ordinance, claiming it was a service animal for her daughter (Tiffany). Nine-year-old Tiffany suffered from numerous health problems, including spina bifida, hydrocephalus, seizures, and incontinence. Approximately three years before the case was decided, Kitchens contacted the Make-A-Wish Foundation to try to obtain a miniature horse for Tiffany. Kitchens also applied for a permit from the town to keep a miniature horse on her property in Jasper, Tennessee. The town’s police chief and public health officer (Graham) visited the property and consulted with neighbors before denying Kitchens’ request.

In denying her request, Graham cited the nearness of Kitchens’ neighbors, as well as their concerns over health and cleanliness in the neighborhood. As a result of this denial, the Make-A-Wish foundation did not provide a miniature horse for Tiffany. However, someone in nearby Chattanooga heard about the
story and obtained a miniature horse from a breeder, which he then delivered to
her.\footnote{Id.} When the horse was kept at the residence, despite lacking the required
permit, the town cited Kitchens for violation of the municipal ordinance, and she
was ordered by the Jasper Municipal Court to remove the animal from her
property.\footnote{Id. at 975-76 (Jasper Municipal Code § 10-102 states that “[n]o person shall keep any
animal . . . within one thousand (1,000) feet of any residence, place of business, or public street
without a permit from the health officer. The health officer shall issue a permit only when in his
sound judgment the keeping of such an animal in a yard or building under the circumstances as set
forth in the application for the permit will not injuriously affect the public health.”).}

Kitchens then appealed her case to the Circuit Court of Marion County.\footnote{Id. at 976.}
Her credibility was called into question by the fact that for the first time in this
appeal, she alleged that the horse was a service animal for Tiffany.\footnote{See id.}
On a visit
to Kitchens’ home, the town’s attorney saw Tiffany walking and playing without
the help of the horse, and noted that “Kitchens seems more interested in the
horse than was Tiffany.”\footnote{Id.} Kitchens filed a federal suit under the ADA after
the Circuit Court ruled in favor of the town.\footnote{Access Now, 268 F. Supp. 2d at 976.}

To prove a qualified disability under the ADA, an individual must
demonstrate “a physical or mental impairment that substantially limits one or
more major life activities of such individual.”\footnote{Americans with Disabilities Act, 42 U.S.C.A. § 12102(1)(A) (West 2008 & Supp. 2009).}
Plaintiffs here alleged that Tiffany’s impairments impacted the major life activities of walking, standing,
substantially limits means: (i) Unable to perform a major life activity that the average person in the
general population can perform; or (ii) Significantly restricted as to the condition, manner or
duration under which an individual can perform a particular major life activity as compared to the
condition, manner or duration under which the average person in the general population can
perform that same major life activity.”).}

To show the necessity of keeping the horse as a service animal, Kitchens explained that the horse had been trained to:

assist Tiffany in standing, walking, maintaining her balance, and
picking up unspecified objects off the floor or ground for Tiffany. If
Tiffany is walking and becomes tired, say the plaintiffs, Tiffany places
her arm on the horse or leans some of her body weight onto the horse so
it can assist her in standing and walking. However, the plaintiffs say
Tiffany only uses the horse in this manner inside Kitchens’ house and in
the backyard. Plaintiffs contend that Tiffany’s use of the horse has
enabled her to become stronger and improve her ability to stand and
walk.\footnote{Access Now, 268 F. Supp. 2d at 977.}
Despite these claims, the court ruled in favor of the town and dismissed Ms. Kitchens’ suit. While expressing sympathy and noting that Tiffany had “significant health problems,” the court stated that she was not disabled under the ADA. In reaching this decision, the court cited the deposition testimony of Tiffany’s physician, who “has never recommended, and would not recommend at this time, that Tiffany use the horse as a service animal. Dr. Strait flatly states that Tiffany does not need a service animal.” A neighbor also testified to the court that Tiffany was able to “stand, walk, run, jump, ride a bicycle and swim by herself without assistance. Tiffany has engaged in these activities and played around the neighborhood both before and after she obtained the horse.” The town introduced videotapes of Tiffany playing outside her home, without the assistance of the horse, which further supported the conclusion that Tiffany was not disabled.

Because the court’s analysis focused on Tiffany’s disability status, the question of whether or not keeping the horse would be a reasonable accommodation under the ADA was never reached. Tiffany’s use of the horse was not the most typical use of a miniature horse as a service animal. Miniature horses are trained by The Guide Horse Foundation primarily for use as guide animals, rather than to physically aid movement. While guide dogs have been used in the United States for over eighty years, the Guide Horse Foundation only began its work in 1999. Horses make excellent guide animals, being known to guide their riders to safety. Sighted horses also serve as guides to keep blind horses with the herd. While a full-size horse certainly can serve as a guide animal, it would not be a practical service animal for many people with disabilities who live in urban or suburban settings. However,
While guide dogs are certainly the most common type of service animal, miniature horses offer several advantages over their canine counterparts. Perhaps the greatest of these is the longevity of a miniature horse, which can live for thirty-five years or more compared to the average service dog lifespan of eight to ten years. This reduces the frequency of needing to obtain a trained replacement animal and spares the individual the grief of losing a companion to which they have grown very attached. Miniature horses also provide an alternative for those who are allergic to dogs, which may be as much as 30% of the U.S. population. Preference for horses over dogs also plays a role for some individuals, including some Muslims, who consider dogs to be unclean.

A twenty-eight-year-old Michigan woman who lost her sight shortly after birth is now able to be more independent with a guide horse, after going her entire life without a service animal due to the belief that “dogs can violate ritual purity.” Mona Ramouni described her life before receiving her guide horse, Cali:

I had basically given up. I mean, I had been to the point where I thought, “I’m going to get nothing out of my life,” . . . [a]nd having Cali . . . showed me that I had forgotten about all the optimism I had as a kid. When I was a kid, I thought I could do anything. I thought everything was possible.

On the other hand, there is a downside to using miniature horses as guide animals. Even their partisans admit that relying on a guide horse can effectively

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165. See The Guide Horse Foundation, Why Use a Mini Horse as a Blind Guide, supra note 160 (“Because horses have eyes on the sides of their heads, they have a very wide range of vision, with a range of nearly 350 degrees.” Other advantages cited are “calm nature” (consider cavalry horses and police horses for proof that horses can be trained to function in stressful environments), “great memory” (“[a] horse will naturally remember a dangerous situation decades after the occurrence”), “focus” (“[t]rained horses are very focused on their work and are not easily distracted. Horses are not addicted to human attention and normally do not get excited when petted or groomed”), “safety conscious” (“horses are constantly on the lookout for danger …. [Horses] demonstrate excellent judgment in obstacle avoidance training”), “high stamina” (“a properly conditioned Guide Horse can easily travel many miles in a single outing”), and “good manners” (“Guide horses are very clean and can be housebroken. Horses do not get fleas and only shed twice per year.”).
168. Id.
171. Leubsdorf, supra note 14.
limit the owner to living in rural or suburban areas, that horses must process waste more often than dogs, and that access to vehicles may be limited as even small horses are physically unable to curl up like a dog.\textsuperscript{173} One organization feels that guide horses represent a danger to their users, citing particularly the fact that while horses “can be ‘trained’ to handle certain situations, . . . when encountering something new or strange they often panic or spook very easily.”\textsuperscript{174} Its website points out that police and military horses are used by trained and sighted riders, who can take corrective measures if the horse spooks or bolts.\textsuperscript{175} Obviously, a blind individual who relied solely on the horse for assistance in navigating would be at a major disadvantage in this situation.

Considering these limitations and disadvantages, it is likely that many potential users of miniature horses as guide animals would decide on their own to utilize the more traditional guide dog.\textsuperscript{176} However, under the regulation proposed in 2008, guide horse users like Ms. Ramouni might find themselves forced to give up their service animals.\textsuperscript{177} While the regulation contained an exception requiring places of public accommodation to continue to make reasonable accommodations for people with disabilities using miniature horses trained to assist with their disability, it also specifically stated that “[t]he miniature horse is not included in the definition of service animal, which is limited to dogs.”\textsuperscript{178} Should the regulation return in this format, it could create an unusual problem for people in Ramouni’s situation: being permitted to take their guide horse to a theater, school, etc., but unable to keep the horse at their home if state or local regulations did not permit miniature horses to be kept in that area.\textsuperscript{179}

In \textit{Access Now}, the court did not have to consider the issue of reasonable accommodation as Tiffany was not found to have a qualified disability.\textsuperscript{180} Once again, this shows that the courts are quite capable of distinguishing a legitimate service animal from a cherished pet. As \textit{Pruett} demonstrates, state and local regulations are certainly part of the equation the court must consider when determining whether allowing a particular service animal constitutes a reasonable accommodation.\textsuperscript{181} This balanced analysis of the benefit to the

\begin{footnotesize}
\begin{enumerate}
\item[175.] See \textsuperscript{id}.
\item[176.] See Weschler, \textit{supra} note 81. (“We really encourage people to use dogs because it’s so much easier with public access . . . .” (quoting Carol King, vice president of the International Association of Assistance Dog Partners)).
\item[177.] Skloot, \textit{supra} note 9.
\item[178.] Skloot, \textit{supra} note 9.
\item[179.] See Skloot, \textit{supra} note 9.
\end{enumerate}
\end{footnotesize}
individual with a disability against the burden to the community remains a better solution than across-the-board banning of the use of particular species as service animals.

B. Other Animals

The species discussed here are by no means the only ones that people have sought to use as service animals, and the list will no doubt expand in the future. While the major court cases involving non-traditional service animals have already been discussed, a brief look at some of these other species reinforces that a one-size-fits-all regulation is unwise.

1. Ferrets

As the popularity of pet ferrets has grown, it was likely inevitable that we would see more cases concerning their use as alleged service animals.182 This question found its way into the courts when Lucy Gwin of Pennsylvania fought the eviction of her ferrets from the no-pets-allowed apartment where she resided.183 Gwin has suffered from seizures since being hit by a drunk driver in 1989.184 She prefers to avoid taking regular seizure medication, claiming it makes her "stupid and unable to think."185

Instead, Gwin has relied upon her ferrets: Idi, Odo, Rooty and Tooty.186 She has said that the ferrets alert her to an impending seizure in time to medicate and lie down, preventing the seizure from occurring.187 Although she has not trained the ferrets to do this, she has owned ferrets for eighteen years and all of them have exhibited this ability.188 Nevertheless, a Washington county court ruled that the ferrets were not service animals.189 Gwin was forced to remove them

182. See GERRY BUCCIS & BARBARA SOMERVILLE, THE FERRET HANDBOOK 1 (Barron’s Educational Services 2001) (stating that ferrets are now the third most popular companion pet in North America, after cats and dogs).
186. Id.
187. Id. The ability of her ferrets to detect pre-seizure changes in her body can be compared to Kristy Pruett’s macaque, which could sense changes in her biological composure associated with diabetes and would alert her or bring her something sugary. See Rubin, supra note 36.
188. Small Animal Channel.com, Woman Says Ferrets that Alert Her to Seizures May Cause Her Eviction (Apr. 19, 2008), http://www.smallanimalchannel.com/critter-news/legal-news/ferrets-cause-eviction.aspx ("When I’m about to have a seizure, they look very unhappy,” Gwin said. ‘They come over and bump my legs, like they’re trying to correct me or stop me from having the seizure.”).
from her apartment while she continued to contest her eviction on other grounds.190

2. Therapy Animals

An alternative service animal, which has not yet been contested in court, is Sadie the parrot of St. Louis.191 Sadie’s owner, Jim Eggers, suffers from psychotic tendencies, which have landed him in court several times. 192 Sadie ameliorates these episodes by sensing the shift in Eggers moods and calming him with soothing phrases.193 Sadie also helps Eggers to cope with the side effects of his anti-psychotic medications by making sounds to alert him to telephone calls, knocks at the door, running faucets, and fire alarms.194 Eggers purchased a special backpack to hold Sadie’s cage and now takes her with him virtually everywhere.195

Trouble developed in 2007 when Eggers and Sadie went to have his teeth cleaned at the dental hygiene school of St. Louis Community College. 196 Sadie was denied access to the school, which questioned her status as a service animal and considered her a possible threat to public health.197 Eggers filed a complaint with the United States Department of Education’s Office of Civil Rights (OCR) but achieved mixed results.198 While the OCR found that the school had violated the ADA by questioning Eggers about his disability, it also found that Sadie was a “therapy animal” rather than a service animal and thus not covered under the ADA.199

190. Id. at *1 (Ms. Gwin claims that apartment employees had been aware of her ferrets for months, and only sought her eviction after she complained about the treatment of other disabled residents. She obtained a temporary restraining order enabling her to stay in the apartment and is challenging her eviction on grounds of retaliation and discrimination based on disability.).
191. See Skloot, supra note 17.
192. Skloot, supra note 17. (Mr. Eggers describes his episodes as being “like when the Incredible Hulk changes from man to monster.” His run-ins with the law have included pouring hot coffee out of his window onto a man below and threatening to kill the Archbishop of St. Louis.).
193. Sarah Casey Newman, Sadie the Parrot, at Your Service, St. Louis Post-Dispatch, Oct. 7, 2006, at L30 (Among Sadie’s calming phrases are “Jim, I love you,” “You’re OK,” and “You’re gonna be OK.”).
194. Skloot, supra note 17.
195. Skloot, supra note 17.
196. Skloot, supra note 17.
197. Skloot, supra note 17 (noting that “[s]everal top epidemiologists [he] interviewed for this article said that, on the whole, birds and miniature horses pose no more risk to human health than service dogs do”).
198. See Skloot, supra note 17 (The court concluded that “the school wrongfully denied access based on public-health concerns without assessing whether Sadie actually posed a risk.”).
199. Skloot, supra note 17 (“‘Therapy animals’ (also known as ‘comfort animals’) have been used for decades in hospitals and homes for the elderly or disabled. Their job is essentially to be themselves -- to let humans pet and play with them, which calms people, lowers their blood pressure and makes them feel better. There are also therapy horses, which people ride to help with balance and muscle building.”).
Drawing the line between service animals and therapy animals is not always easy, and in at least one case, the authorities found it easier to give in than continue the fight.\textsuperscript{200} An Ohio couple claimed that two goats, D.J. and Blessing, helped their thirteen-year-old son, David, to cope with his attention deficit hyperactivity disorder.\textsuperscript{201} The town filed suit in state court, objecting to the goats as a violation of local zoning regulations.\textsuperscript{202} The family and a disabled advocacy group attempted to shift the case to federal court, but the judge ruled that the zoning issue must first be decided in state court.\textsuperscript{203}

Town officials ultimately opted to settle the lawsuit.\textsuperscript{204} David was allowed to keep D.J. and Blessing, “until he turns 18, graduates from high school, or no longer needs the goats for his medical therapy. . . . [The] family must maintain a six-foot-high privacy fence . . . and provide documentation each year from David’s doctor indicating that tending the goats is still therapeutic for him.”\textsuperscript{205}

It is understandable that cities prefer not to spend time and resources in litigation against their residents, but the town would likely have prevailed if it had pursued the case.

Although the DOJ’s 2008 proposed regulation contained language clarifying the government’s view of “therapy animals,” none of the information represented a change in policy from what currently exists.\textsuperscript{206} While nothing prevents a person with a mental disability from utilizing a service animal, the DOJ stated its position that “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.”\textsuperscript{207} While such a clarification would not be harmful, this information is not new because these animals can already be ruled out by the current requirement that service animals be “individually trained to do work or perform tasks for the benefit of an individual with a disability….”\textsuperscript{208}

Accession to requests to accommodate non-traditional service animals typically results from decisions of local government, as in the case of D.J. and

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  \item \textsuperscript{201} Jane Prendergast, Livestock or 'Gift From God'? \textit{, CINCINNATI ENQUIRER, Nov. 4, 2005, at A1} (According to David, “the goats motivate him more than the other pets because they’re like a kid with ADHD. ‘They don’t really listen very well,’ he said. ‘That’s kind of like me.’”).
  \item \textsuperscript{202} Kevin Osborne, Federal Judge Tosses Goat Lawsuit, \textit{CINCINNATI ENQUIRER, Dec. 9, 2005, at B2} (Miami Township’s zoning law permits “only dogs, cats, birds, snakes of less than 6 feet, mice, gerbils, ferrets, hamsters, minks, rabbits, guinea pigs, fish, turtles, lizards, iguanas and pot-bellied pigs as household pets.”).
  \item \textsuperscript{203} \textit{Id}.
  \item \textsuperscript{204} Brunsman & Prendergast, \textit{supra} note 200.
  \item \textsuperscript{205} Dave Reynolds, Settlement Allows Teen to Keep Goats (Aug. 26, 2006), http://www.raggededgemagazine.com/ide/002833.html.
  \item \textsuperscript{206} Nondiscrimination on the Basis of Disability, \textit{supra} note 6, 73 Fed. Reg. at 34,516.
  \item \textsuperscript{207} Nondiscrimination on the Basis of Disability, \textit{supra} note 6, 73 Fed. Reg. at 34,516 (alteration in original) (The DOJ further states that “[i]t is important to clarify the Department’s longstanding position and is not a new position.”).
  \item \textsuperscript{208} 28 C.F.R. § 36.104 (2009).
\end{itemize}
Blessing, or from a business’s fears that it will violate the ADA should it prohibit the animal’s entry. For example, this happened to US Airways when a passenger alerted the airline that she would be accompanied on the flight by her service animal, which happened to be a 300-pound pot-bellied pig. Charlotte the pig boarded the flight from Philadelphia to Seattle. Other passengers later complained that “Charlotte became distressed upon the aircraft’s descent to land, ran around the cabin squealing and attempted to enter the galley and the cockpit...”

Charlotte’s owner had a doctor’s note stating that due to a serious heart condition, she required the company of the pig to ameliorate stress. In *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, Susan D. Semmel speculates that “airline ticket agents, who are probably not attorneys, were perhaps fearful of taking an action possibly interpreted as discrimination.” While understandable, this situation did not have to occur. It is unlikely that any court would have considered Charlotte a service animal, let alone required the airline to transport such a beast in the passenger cabin as a reasonable accommodation.

Numerous concerns render particular animals or species unsuitable for selection as a service animal. For instance, use of endangered species in this fashion likely would not be coincident with conservation goals. As the foregoing cases show however, the courts are well positioned to consider individual circumstances, in light of applicable laws and the interests of the state.

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209. See Nondiscrimination on the Basis of Disability, supra note 6, 73 Fed. Reg. at 34,515 (“It appears that many covered entities are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals.”).
211. Id.
212. Id.
213. Id. at 40.
214. Id.
215. See Must Carriers Permit Passengers With a Disability to Travel With Service Animals?, 14 C.F.R. § 382.117(f) (2009) (“You are never required to accommodate certain unusual service animals (e.g., snakes, other reptiles, ferrets, rodents, and spiders) as service animals in the cabin. With respect to all other animals, including unusual or exotic animals that are presented as service animals (e.g., miniature horses, pigs, monkeys), as a carrier you must determine whether any factors preclude their traveling in the cabin as service animals (e.g., whether the animal is too large or heavy to be accommodated in the cabin, whether the animal would pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country that is the flight’s destination). If no such factors preclude the animal from traveling in the cabin, you must permit it to do so. However, as a foreign carrier, you are not required to carry service animals other than dogs.”).
216. See Endangered and Threatened Wildlife and Plants, Definitions, 50 C.F.R. § 17.3 (2009) (“Harm in the . . . [Endangered Species] Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or . . . impairing essential behavioral patterns, including . . . feeding or sheltering.”).
The proposed regulation, which would trade this individual examination for an across-the-board ban, does not comport with the ADA, which requires that “[a]n individual analysis must be made with every request for accommodations and the determination of reasonableness must be made on a case by case basis.” Our current regulatory system provides opportunity for people with disabilities to choose the service animal that best suits their situation, while also providing a framework to disallow abuses and ridiculous situations, such as Charlotte’s accumulation of frequent flier miles.

IV. CONFLICT WITH STATE & LOCAL LAWS

Another issue that may arise with a more stringent federal definition of what constitutes a service animal is a potential conflict with more generous definitions under state and local law.

Federal supremacy requires that the ADA triumph over any state or local law that grants fewer rights or less protection than the ADA. However, states and cities are free to provide additional rights and protections within their jurisdictions beyond those mandated by the ADA.

For example, Georgia specifically recognizes capuchin monkeys, such as those trained by Helping Hands, within the state’s definition of a service animal. Ohio recognizes “service monkeys” within its definition without specifying a species. Should a regulation like that proposed in 2008 be enacted, service monkeys would lose their service animal status under federal law, but state law would be unaffected. Imagine a resident of Georgia or Ohio who relied upon a service monkey to assist with her disability, finding herself suddenly unable to cross state lines without being stripped of that assistance. Her life could continue as normal in Atlanta or Cincinnati, but she would be functionally prohibited from free movement across state lines.

The Supreme Court has found that a “right to travel” exists, protecting both “the right of a citizen of one State to enter and to leave another State, [and] the right to be treated as a welcome visitor rather than an unfriendly alien when

219. See Semmel, supra note 210, at 54.
220. See Green v. Hous. Auth., 994 F. Supp. 1253, 1257 (D. Or. 1998) (The court struck down an Oregon statute requiring that a hearing ear dog be on an orange leash, finding that was not a valid requirement under the ADA.).
221. See Nondiscrimination on the Basis of Disability, supra note 6, 73 Fed. Reg. at 34,510; Semmel, supra note 210, at 54-57 (stating that two areas where states can give more rights are in damages and in service animal training).
222. Ga. Comp. R. & Regs. 290-5-14-.01(zzzz) (2009) (“‘Service animal’ means an animal such as a guide dog, signal dog, capuchin monkey, or other animal that is individually trained to provide assistance to an individual with a disability.”).
temporarily present in the second State….” 224 While these unfortunate residents of the Peach and Buckeye states would not be actually prohibited from crossing a state border, depriving them of their normal assistance to perform major life activities during these travels might be viewed as treating them like “unfriendly aliens.” In any event, penning up people with disabilities in their home state does not meet the goals of the ADA as stated by President Bush when he signed the act: “independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”225

The existing federal standard also protects against excesses in the other direction. Consider San Francisco, a city renowned for its tolerance, where landlords have acquiesced to service animal demands like the woman with a doctor’s note “stating her inability to conceive and express her maternal instinct necessitated her to breed hamsters,” and the stroke victim who says that caring for service tortoises helps with focus.226 San Francisco Animal Care and Control issues service dog tags to anyone displaying a doctor’s note, provided she will sign an affidavit that she is not engaged in fraud.227 While such tags are not required by the ADA,228 they can lend an aura of official approval to those who seek to abuse the ADA’s service animal provisions.

The current system (perhaps with the exception of San Francisco) provides safeguards against such abuses. Recall the tests articulated in the Pruett case - (1) whether the modifications are necessary to prevent discrimination against a disability; (2) whether the modifications would fundamentally alter the nature of existing statutes and regulations; and (3) whether the modifications are reasonable.229 This standard provides a benchmark for evaluating legitimate service animal usage across the entire country, protecting the rights of people with disabilities while enabling challenges to absurd or potentially dangerous situations. A tightening of the federal standard may lead to a proliferation of more generous rules in states and cities across the country, creating islands of San Francisco-style tolerance and other areas where federal law accords the status of service animals only to traditional guide dogs.

226. Joe Eskenazi, Service With a Snarl, S.F. WKLY., June 17, 2009, available at 2009 WLNR 11760274 (“In San Francisco, snakes, lizards, pit bulls, chickens, pigeons, and rodents have all been declared service animals, hauled onto public transportation, housed legally in city apartments, and, essentially, given the full run of the city.”).
227. Id.
V. CONCLUSION

As these situations show, significant hurdles already exist to the use of non-traditional service animals. In addition to the ADA, individuals may have to deal with other legislation depending on what type of animals they are seeking to keep. While the ADA covers public housing, individuals seeking to keep their service animals in private housing must contend with the Fair Housing Amendments Act of 1988. Those who attempt to fly with their service animals must deal with provisions of the Air Carrier Access Act of 1986. The paucity of cases shows that the courts are hardly clogged with attempts to legitimize non-traditional service animals, whether legitimate or frivolous. The failure in virtually every case of the individual seeking accommodation for their service animal also shows that the current open-ended standard is not easily met when analyzed by a court of law.

While this lack of success in the courts may lead some to believe that the proposed regulation would not cause any harm, this is illusory. The cases of the Helping Hands’ monkeys and the Guide Horse Foundation’s horses show that there is a small but legitimate place for non-traditional service animals. Rather than indicating that a regulation should be promulgated with exceptions for guide horses and service monkeys, these examples show that our current, open-ended system allows for varied individual challenges to be met and allows for change over time. While Helping Hands predates the ADA itself and has been training capuchin monkeys since 1979, the Guide Horse Foundation only arrived on the scene in 1999.

It is likely that future innovations will lead to additional species being identified and trained as viable service animals. The number of individuals potentially seeking accommodations also is likely to grow, given the ADA Amendments Act of 2008, which requires that the ADA be “construed in favor of broad coverage of individuals under [the] Act, to the maximum extent permitted by [its] terms.” Any regulation allowing only certain prescribed species would almost certainly stymie this innovation and harm the people with disabilities who would otherwise benefit.

There are also the situations that have not been litigated to consider, such as Mr. Eggers and his parrot Sadie. Does a caged parrot really represent a greater burden than a guide dog in an apartment, on a bus, or in a restaurant? The bar is

231. Semmel, supra note 210, at 53-54.
232. See Brunsman & Prendergast, supra note 200. Of the service animals discussed in this article, only the goats D.J. and Blessing survived a legal challenge - when Miami Township elected to settle the case outside of court.
233. Helping Hands, supra note 76.
234. See The Guide Horse Foundation, supra note 156.
set appropriately high by the current regulation, and this should remain in place to provide people with disabilities with maximum opportunity to integrate into society as contemplated within the ADA. The current system works. The abuses of a few should not deny other individuals the chance to utilize a service animal that provides them with the greatest access to the mainstream of American life.
WHY THE “NEW ADA” REQUIRES AN INDIVIDUALIZED INQUIRY AS TO WHAT QUALIFIES AS A “MAJOR LIFE ACTIVITY”

Danielle J. Ravencraft*

I. INTRODUCTION

It is hard to imagine what life would be like without the ability to drive. Most people reading this article drive themselves to and from home, work, school, and a variety of other places, all on a daily basis. For these individuals, it would be hard to seriously argue that driving is not an activity of central importance to daily life. However, there are individuals for whom driving is not a particularly significant activity, such as those living in urban areas with readily available access to public transportation. For these individuals, the sudden inability to drive might not significantly affect their daily lives, if at all.

According to case law interpretation of what constitutes a “major life activity” under the Americans with Disabilities Act (“the ADA”), the existence of the latter group means that driving cannot be a major life activity, even for those individuals in the former group for whom driving is of great importance. This is because courts have consistently employed a uniform approach to deciding whether an activity is “major” for purposes of an ADA claim without accommodation of individual needs and circumstances. As a result, every federal court of appeals that has considered the issue has held that driving is not a major life activity (“MLA”) under the ADA. However, this approach is inconsistent with the purpose and intent of the ADA, which is to provide widespread protection to disabled individuals across the country. Furthermore,

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3. Five circuits have held that driving is not a major life activity. Winsley v. Cook County, 563 F.3d 598 (7th Cir. 2009); Kellogg v. Energy Safety Servs. Inc., 544 F.3d 1121 (10th Cir. 2008); Robinson v. Lockheed Martin Corp., 212 F. App’x 121 (5th Cir. 2007); Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001); Colwell, 158 F.3d at 643.

as demonstrated below, this rigid approach often leads to “capricious” and “arbitrary” results.

Using driving as an example, this article demonstrates why courts should utilize an individualized inquiry approach and consider whether an activity is of central importance to the claimant’s life, irrespective of its importance to most people’s lives, in deciding whether that activity is an MLA. Part II of this article relates the background and history of the original ADA with the recent passage of the Americans with Disabilities Amendments Act to further illustrate the development of the definition of MLA. Part III examines the current \textit{per se} approach employed by courts in deciding whether an activity is an MLA for purposes of the ADA and demonstrates that such an approach usually yields arbitrary, and even illogical, results. Part IV demonstrates why driving should be an MLA for some ADA claimants. In particular, Part IV explores \textit{Kellogg v. Energy Safety Services}, a recent decision from the Tenth Circuit Court of Appeals, including the opinion reached by both the district judge and one court of appeals judge, who both determined that driving could be an MLA. Part V addresses potential concerns regarding implementation of an individualized inquiry approach and suggests potential factors and guidelines that future courts might use in deciding whether a particular activity is of central importance to an individual claimant’s life. In sum, this article demonstrates that an individualized inquiry as to whether an activity is an MLA under the ADA is desirable, not only to avoid arbitrary and conclusory rulings, but to effectuate the purpose of the “new” ADA.

\section*{II. BACKGROUND}

\subsection*{A. The Americans with Disabilities Act – Two Decades of Disappointment}

The ADA was originally passed in 1990 to protect individuals with disabilities from discrimination in the workplace and places of public accommodation. One major difference between the ADA and other civil rights statutes is that an ADA plaintiff is required to show that he or she is entitled to protection by demonstrating evidence of a “disability” before the court will even consider whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individuals’ impairment is a disability under the ADA should not demand extensive analysis.”).  \footnote{5. The author suggests an approach similar to that which is used for the “substantial impairment” prong. \textit{See Toyota Motor Mfg., Inc.}, 534 U.S. at 199; \textit{see also} \textit{Sutton v. United Airlines}, 527 U.S. 471, 483 (1999) (requiring an individualized inquiry into whether an impairment substantially limits the claimant’s ability to perform a major life activity).}

6. 42 U.S.C. §§ 12101-12213 (1990); \textit{see also} \textit{Heiko v. Colombo Sav. Bank}, 434 F. 3d 249, 259 (4th Cir. 2005) (stating that the “ADA was designed to protect the truly disabled, but genuinely capable”); George H. W. Bush, President, Remarks at the signing of the ADA (transcript available at \text{http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html}) (last visited May 27, 2010).
consider the merits of the claim—i.e. whether the defendant acted wrongfully.\footnote{7} To establish a prima facie case of discrimination, the ADA plaintiff must first show that he or she meets the ADA’s definition of “disability” by having:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.\footnote{8}

Next, a plaintiff must demonstrate that the physical or mental impairment substantially limits his or her ability to perform at least one MLA.\footnote{9} Because “impairment” is defined broadly,\footnote{10} the majority of individuals are easily able to demonstrate the first element.\footnote{11} In fact, most defendants do not even contest the issue of whether the plaintiff has an “impairment.”\footnote{12}

Conversely, the “substantially limits” element has often been the most difficult element for an ADA plaintiff to meet.\footnote{13} Although the original ADA did not define the phrase “substantially limits,” both the regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”)\footnote{14} and Supreme Court cases interpreting the ADA have narrowly interpreted the phrase to mean “prevents” or “significantly restricts.”\footnote{15} No disease or impairment is a disability \textit{per se},\footnote{16} instead, each ADA claimant is subject to an “individualized inquiry” as


\footnote{8} 42 U.S.C. § 12102(1).


\footnote{10} ADA Employment Provisions, 29 C.F.R. § 1630.2(h) (1991); \textit{Bragdon}, 524 U.S. at 635 (holding that while the CFR identifies certain activities that are included as major life activities, the list is only illustrative and not meant to be exhaustive).

\footnote{11} See \textit{Eichhorn, supra} note 7, at 1475 (stating that in most ADA cases, “the impairment issue rarely surfaces as a point of contention”).

\footnote{12} See \textit{Eichhorn, supra} note 7, at 1475; \textit{see also} MacKenzie v. City and County of Denver, 414 F.3d 1266, 1275 (10th Cir. 2005)

\footnote{13} See 29 C.F.R. § 1630.2(j).

\footnote{14} \textit{Id.} (noting that the EEOC defined “substantially limits” as “unable to perform a major life activity that the average person in the general population can perform;” or “significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity, as compared to the . . . average person in the general population . . . ”).

\footnote{15} See, e.g., Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197 (2002) (interpreting “substantially limits” as “prevents” or “significantly restricts”); Sutton v. United Airlines, 527 U.S. 471, 480 (1999) (holding that a person must be presently and substantially limited in his or her ability to perform a major life activity, considering use of any mitigating measures used by the plaintiff).

\footnote{16} See, e.g., Waldrip v. Gen. Elec. Co., 325 F.3d 652, 656 (5th Cir. 2003) (“[N]either the Supreme Court nor [the Fifth Circuit] has recognized the concept of a \textit{per se} disability under the
to whether he or she is substantially limited by the condition at issue. As a result of this strict standard, many ADA claims had, prior to January 1, 2009, been easily defeated by a motion to dismiss or a motion for summary judgment.

The final requirement, in order to demonstrate the existence of an actual disability under the ADA is the identification of at least one MLA which is substantially limited by the impairment in question. This requirement falls somewhere between the other two in terms of difficulty to overcome. The issue of whether a particular activity is an MLA is almost always a question of law. While the original version of the ADA did not define MLA, regulations promulgated by the EEOC offered a non-exhaustive list of examples, such as caring for oneself, walking, seeing, hearing, breathing and speaking.

Because courts generally have interpreted the ADA narrowly, ADA plaintiffs were frequently barred from relief almost two decades after the Act was passed. In fact, less than ten years after its passage, “a significant percentage” of ADA claims were being dismissed on summary judgment because the plaintiff could not establish a prima facie case, including the existence of a disability. This led many legal scholars to conclude that the ADA had failed to deliver the anticipated and much-celebrated protection to disabled individuals expected when President Bush first signed it into law.

ADA, no matter how serious the impairment; the plaintiff still must adduce evidence of an impairment that has actually and substantially limited the major life activity on which he relies."

17. 29 C.F.R. app. § 1630.2(i); see also Bragdon v. Abbott, 524 U.S. 624, 639-42 (refusing to hold that an HIV infection is a per se disability and requiring an individualized inquiry as to whether an impairment substantially limits a major life activity).


19. Bragdon, 524 U.S. at 631 (stating that a court may dismiss an ADA claim where the plaintiff fails to identify a specific major life activity in the pleadings); see also Fedor v. Ill. Dep’t of Employment Sec., 955 F. Supp. 891, 893 (N.D. Ill. 1996) (holding that the plaintiff “failed to plead himself into court” by not identifying a major life activity). Bui see Powell v. Morris, 184 F.R.D. 591, 596 (S.D. Ohio 1998) (stating that although the plaintiff did not use the phrase “major life activity,” her claim put the defendants on notice as to the nature of the suit).


21. Compare Berry v. T-Mobile USA, Inc., 490 F.3d 1211, 1216 (10th Cir. 2007) (stating that the determination of MLA is a question of law), with Gonzalez v. Rite Aid of N.Y., Inc., 199 F. Supp. 2d 122 (S.D.N.Y. 2002) (holding that the question of whether extreme physical exercise and performance of manual tasks are “major life activities” is best decided by a jury, at trial).

22. 29 C.F.R. § 1630.2(i).

23. See Eichhorn, supra note 7, at 1407-08 (citing a study which revealed that in cases where one party clearly prevailed, ninety-two percent of judicial decisions favored defendants).

24. See Eichhorn, supra note 7, at 1407; see also Wendy Wilkinson, Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act, 38 S. TEX. L. REV. 907, 908 (1997) (noting that, surprisingly, an inability to prove the existence of a “disability” under the ADA was defeating many plaintiffs’ claims six years after the ADA was passed).

address this shortcoming, Congress passed the ADA Amendments Act ("the ADAAA") of 2008.26

B. The ADAAA of 2008

The ADAAA became effective on January 1, 2009.27 With its passage, Congress made changes to the language of the ADA itself, while also explicitly rejecting several Supreme Court decisions that had narrowly interpreted key terms under the prior version of the ADA.28 Specifically, Congress rejected the Court’s holdings in Toyota Motor Mfg., Inc. v. Williams and Sutton v. United Airlines29 as too strict an interpretation of whether a condition “substantially limits” a major life activity,30 finding that the opinions frustrated the “clear and comprehensive” purpose of the ADA, to eliminate discrimination.31 Through the Amendments, Congress sought to expand ADA coverage by broadening the scope of “substantially limits” and including examples of MLAs.32 Although the basic requirements for establishing an actual disability under the ADA remain the same (a physical or mental impairment which substantially limits the ability to perform a major life activity), future ADA claimants should, theoretically, have a much easier time establishing the existence of these elements.33

Some ambiguities still remain. For example, although the ADAAA provides examples of some activities which qualify as MLAs, the list is non-exhaustive.34 Therefore, although the named activities are now considered MLAs as a matter of law, courts are (presumably) free to continue to find that other activities qualify as MLAs as well. Unfortunately, the ADAAA fails to provide guidelines

29. Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 199-203 (2002) (interpreting “substantially limits” as “prevents” or “significantly restricts”); Sutton v. United Airlines, 527 U.S. 471, 513 (1999) (holding that a person must be presently and substantially limited in his or her ability to perform a major life activity, considering use of any mitigating measures used by the plaintiff).
31. Id. at § 2(b)(1).
32. Id.
34. 42 U.S.C. § 12102(2)(A) (“Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”) (emphasis added).
or factors for courts to use to decide whether an activity is of “central importance to most people’s lives,” and further, fails to clarify whether this is still the appropriate standard. Therefore, where the activity at issue is not expressly named in 42 U.S.C. § 12102 (2)(A), courts appear to be left with the same per se approach in use for the last two decades.

III. WHAT IS AN MLA – AND HOW DO COURTS DECIDE?

A. Examples of MLAs Provided by the ADAAA

It is well established that an ADA claimant must precisely identify the MLA substantially limited by his impairment. If the claimant cannot do this, his ADA claim will fail, irrespective of the defendant’s wrongful or discriminatory conduct. And while it is well understood that the list of MLAs enumerated in the ADAAA is not exhaustive, it is less clear how courts should determine if other activities qualify as MLAs. As a result, it is possible, and perhaps likely, that various jurisdictions will disagree as to whether particular activities are MLAs.

First, it is worth noting that the listed examples, first promulgated by the EEOC and then incorporated into the ADAAA, prove somewhat problematic in themselves. By offering examples—seeing, hearing, walking and breathing—the definition of disability appears slanted in favor of claimants with readily apparent or more traditional disabilities. Individuals who are blind or deaf, or

35. The ADAAA does not explicitly reject the Court’s definitions of “major life activity” in Bragdon and Toyota Motor Mfg., Inc., focusing more on the Court’s interpretation of “substantially limits.” See ADA Amendments Act § 2(b)(4)-(5).

36. See infra Part IV (explaining that the majority of courts decide whether an activity is of central importance to most people’s lives without consideration of its importance to the particular claimant’s life).

37. See supra note 19; see also Ellenberg v. N.M. Military Inst., 572 F.3d 815, 824 (10th Cir. 2009); MacKenzie v. City and County of Denver, 414 F.3d 1266, 1275 (10th Cir. 2005).

38. See 42 U.S.C. § 12102(1)(A); see also Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 382 (3d Cir. 2004) (holding that a claimant must identify the major life activity limited); Reeves v. Johnson Controls Word Serv., Inc., 140 F.3d 144, 153-54 (2d Cir. 1998) (stating that an individualized inquiry into MLAs would significantly lessen the claimant’s burden of proof).

39. See supra note 34; see also Reeves, 140 F.3d at 150 (holding that a list of major life activities was illustrative); Davis v. City of Grapevine, 188 S.W.3d 748, 762 (Tex. Ct. App. 2006) (holding that such lists are non-exhaustive).

40. See Edmonds, supra note 18, at 369-74 (arguing that courts should adopt specific factors to use in determining whether an activity is of “central importance to daily life” and, thus, an MLA.).


42. Edmonds, supra note 18, at 325 (“One reason why many ADA plaintiffs fail to meet the definition of disability lies in the EEOC’s definition of the term “major life activity.”).

43. Edmonds, supra note 18, at 325.
who use wheelchairs or portable oxygen equipment, will almost always be able to argue that they are substantially limited in their ability to perform the MLAs of seeing, hearing, walking, and breathing. 44

On the other hand, less apparent impairments, such as mental illness, diabetes or epilepsy, generally do not result in substantial limitations on an individual’s ability to see, hear, walk or breathe. Yet these impairments might very well cause an individual to experience substantial limitations in MLAs that are not expressly in the ADA. 45 While such a plaintiff’s ADA claim is not barred per se, the plaintiff has the additional burden of proving that the activity at issue is an MLA, while a plaintiff who claims to be impaired in the ability to perform one of the listed MLAs does not. If the court finds that the activity at issue does not qualify as an MLA, the plaintiff’s claim is barred, irrespective of the defendant’s wrongdoing or the plaintiff’s actual damages. 46

B. How Do Courts Decide Whether an Activity is “Major” Enough?

Under the previous version of the ADA, the phrase “major life activities” was not defined. 47 It was not until the Supreme Court, more than a decade ago in Bragdon v. Abott, offered some guidance as to what constituted an MLA 48 that any sort of guidelines began to emerge. 49 In Bragdon, the defendant dentist refused to treat the plaintiff in his office for a cavity after she disclosed she was positive for the Human Immunodeficiency Virus (“HIV”). 50 The plaintiff brought suit under the ADA, claiming that her HIV was a disability under the ADA because it substantially impaired her ability to reproduce and have children, which she argued qualified as an MLA. 51

As an issue of first impression, the Supreme Court concluded that reproduction was an MLA, quoting the First Circuit Court of Appeals opinion below and stating: “the plain meaning of the word ‘major’ denotes comparative importance [and] suggest[s] that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.” 52 Because reproduction

44. Edmonds, supra note 18, at 325.
45. See Edmonds, supra note 18, at 326 (citing Anderson v. N.D. State Hosp., 232 F.3d 634, 636 (8th Cir. 2000)) (acknowledging that while driving was not included in the EEOC list of MLAs, it would nonetheless consider whether plaintiff was substantially limited in her driving).
46. 42 U.S.C. § 12102(1) (requiring that the impairment substantially limit “one or more major life activities” of the individual); see, e.g., Jackson v. City and County of Denver, 628 F. Supp. 2d 1275, 1290 (D. Co. 2008) (holding plaintiff’s claim was barred because no major life activity was articulated).
48. See Edmonds, supra note 18, at 339 (noting that although Bragdon provided some guidance, such guidance was arguably minimal).
50. Id.
51. Id. at 638.
52. Id. (quoting Bragdon v. Abbott, 107 F.3d 934, 939-40 (1st Cir. 1997)).
was “central to the life process itself,” the Court held that it was a sufficiently significant activity to qualify as an MLA.53

However, as one commentator noted, Bragdon failed to offer any real guidance to future courts as to exactly what constituted an MLA, aside from its holding that reproduction qualified.54 In fact, the Court’s description of an MLA as a “significant” activity does “little more than replace one synonym for another.”55 Additionally, there is some confusion as to whether the Bragdon court concluded that reproduction was a major life activity based upon an individualized inquiry of the plaintiff in that case, or because it found that reproduction is sufficiently significant so that it would qualify as an MLA for all persons.56

The majority of courts, like the Second Circuit Court of Appeals in Colwell v. Suffolk County Police Department, interpreted Bragdon to mean that an activity, like reproduction or driving, must be of general significant importance to qualify as an MLA.57 Under this interpretation, it is of little to no importance whether the activity at issue is significant in the particular claimant’s life.58 The Colwell court based its interpretation on the fact that the Bragdon court determined that reproduction was an MLA without ruling on whether reproduction was an important part of the claimant’s life.59 In other words, she was able to establish an actual disability because reproduction is generally a significant part of most people’s lives. It should be noted here that the Bragdon

53. Id. at 638.
54. Edmonds, supra note 18, at 339 (“The Court's decision in Bragdon v. Abbott was decisive on the question of whether reproduction is a major life activity, but indecisive on whether any other activity should be so considered.”).
55. Edmonds, supra note 18, at 339.
56. 524 U.S. at 657 (Rehnquist, C.J., concurring) (“It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made ‘with respect to an individual.’ Were this not sufficiently clear, the Act goes on to provide that the ‘major life activities’ allegedly limited by an impairment must be those ‘of such individual.’”) (citing 42 U.S.C. § 12102(A)) (emphasis added).
57. Colwell v. Suffolk Co. Police Dept., 158 F.3d 635, 642 (2d Cir. 1998) (“In deciding whether a particular activity is a ‘major life activity,’ we ask whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff.”); see also Reeves v. Johnson Controls Word Serv., Inc., 140 F.3d 144, 151-52 (2d Cir. 1998) (“We do not think that such major life activities as seeing, hearing or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by our precedents as major life activities per se.”).
58. Compare Colwell, 158 F.3d 635 (holding that consideration of whether an activity is an MLA is based upon the activity’s general importance, instead of its importance to the individual claimant), with Sandison v. Mich. High Sch. Athletic Ass'n, 863 F. Supp. 483 (E.D. Mich. 1994), partially reversed, 64 F.3d 1026 (6th Cir. 1995) (holding that the plaintiffs were substantially limited in the major life activity of participating in high school athletics “because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, [and so], it is as to them a major life activity”).
59. Colwell, 158 F.3d at 642 (citing Bragdon, 524 U.S. at 637-38).
Court actually did consider whether reproduction was important to the claimant, noting her testimony that she had refrained from having children because of her HIV status, although the discussion related to the Court’s determination of whether the claimant could demonstrate that her “impairment” (HIV) substantially limited her ability to reproduce (a major live activity). 60

Irrespective of whether the Colwell court correctly interpreted Bragdon, the Supreme Court ultimately affirmed this rationale in Toyota Motor Mfg., Inc. v. Williams, where it held that MLAs are “activities that are of central importance to most people’s daily lives.” 61 In Toyota Motor Mfg., the plaintiff brought suit against her former employer under the ADA for refusing to provide her with reasonable accommodations for her carpal tunnel syndrome, which she alleged prevented her from performing her duties as an assembly line worker. 62 The plaintiff alleged that she had an actual disability under the ADA on the grounds that her physical impairments substantially limited her ability to: (1) perform manual tasks, (2) perform housework, (3) garden, (4) play with her children, (5) lift, and (6) work—arguing that each was a MLA under the ADA. 63 A unanimous Supreme Court held that in order to be “substantially limited in performing manual tasks [under the ADA], an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” 64 Finding that the plaintiff could not meet this admittedly “strict interpretation,” 65 the Court reversed the Sixth Circuit’s grant of partial summary judgment and remanded. 66

The above decisions implicitly adopt a per se approach to questions concerning MLAs because they do not require an individualized inquiry as to whether the activity in question is of central importance to the claimant’s life. Additionally, they ruled upon whether one activity or another qualifies as an MLA on an ad hoc basis, offering little guidance as to how such decisions should be made in the future. As one commentator noted, the result is that decisions as to whether an activity qualifies as an MLA under the ADA “tend to be cursory, to the point where they almost appear capricious.” 67 In fact, it is common for a court to summarily decide that a contested activity, such as driving, is not an MLA with little to no discussion or analysis of the issue. 68

60. Bragdon, 524 U.S. at 641.
62. Id. at 187-88.
63. Id. at 190.
64. Id. at 198.
65. Id. at 197.
66. Id. at 203.
67. Edmonds, supra note 18, at 327 (noting that courts have been provided few guidelines with which to decide those activities which qualify as being of central importance to most people’s lives and those that do not qualify); see also Kindlesparker v. Metro. Life Ins. Co., No. 94-C-7542, 1995 WL 275576, at *1 (N.D. Ill. May 8, 1995).
68. Edmonds, supra note 18, at 362-63 (“Most courts that have discussed driving have dismissed it as a major life activity with little discussion.”); see also Robinson v. Lockheed Martin
short, because “courts have no clear standards to guide them in [deciding what activities qualify as MLAs], their decisions are often confusing and contradictory.”

The recent passage of the ADAAA offers little in the way of alleviating this problem. Although the ADAAA certainly calls the holdings in Sutton and Toyota Motor Mfg. into question, it fails to offer an alternative definition of MLA. Further, although it may be a year or more before an ADA claim is decided under the ADAAA, no court has yet rejected the now well-accepted definition of MLA from Toyota Motor Mfg. Regardless of whether courts quote the phrase “of central importance to most people’s daily lives,” the standard is still being applied. In other words, despite the passage of the ADAAA, courts are still employing a per se approach to determine if an activity qualifies as an MLA, without consideration of the individual circumstances of each case. This approach, as demonstrated in greater detail below using driving as an example, is contrary to the stated purposes of the ADA and the ADAAA. As demonstrated below, only by applying an individualized inquiry to all aspects of a plaintiff’s ADA claim - including whether the activity/activities at issue are MLAs - will disabled individuals finally be afforded full protection.

69. Edmonds, supra note 18, at 327.

70. ADA Amendments Act of 2008, Pub. L. 110-325 § 2(b)(4), 122 Stat. 3553 (2009) (rejecting “the standards enunciated by the Supreme Court in [Toyota Mfg.] . . . that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives . . .”). Although Congress explicitly rejected the Toyota Mfg. court’s strict interpretation of “substantially limits” and “major,” it did not provide a clear guide as to a better or alternative interpretation of these terms. Therefore, while noting the passage of the ADAAA (which has not been applied retroactively), courts continue to use Toyota Mfg.’s definition of “major life activity” as an “activity which is of central importance to most people’s lives.”

71. See ADA Amendments Act § 2(b)(5) (highlighting that the ADAAA expressly rejected Toyota Mfg.’s interpretation of “substantially limits,” as “significantly restricted”).

72. See, e.g., EEOC v. Agro Distrib., 555 F.3d 462, 469 n.8 (5th Cir. 2009); Kiesewetter v. Caterpillar, Inc., 295 F. App’x 850, 851 (7th Cir. 2008); White v. Sears, Roebuck & Co., No. 07-CV-4286, 2009 WL 1140434, at *5 (E.D.N.Y. Apr. 27, 2009); Supinski v. United Parcel Serv., Inc., No. 06-CV-0793, 2009 WL 113796, at *5 n.6 (M.D. Pa. Jan. 16, 2009) (collecting cases nationwide and noting that “every court that has addressed the issue has concluded that the 2008 Amendments cannot be applied retroactively to conduct that preceded [the] effective date”).

73. 534 U.S. at 198 (holding that an MLA is one which is of “central importance to most people’s lives”).

74. See, e.g., Winsley v. Cook County, 563 F.3d 598, 603-04 (7th Cir. 2009) (noting that driving was not an MLA because it was less important in some parts of the country than others).

75. This application of the pre-amendment version of the ADA by courts is limited to those situations in which the facts giving rise to the case occurred before the ADAAA effective date of January 1, 2009. See Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 567 (6th Cir. 2009) (stating that “the ADA Amendments Act does not apply to pre-amendment conduct,” even if the case is filed or decided after January 1, 2009).
from discrimination, as promised and intended by Congress almost twenty years ago.

IV. DRIVING IS NOT AN MLA – FROM NEW YORK TO WYOMING

A. Setting the Stage: Colwell, Chenoweth and Winsley

As noted above, only a few courts of appeals have directly addressed the question of whether driving is an MLA, with all that have done so answering in the negative. Although the facts and reasoning vary, all courts that have considered the issue ultimately reached the conclusion that because driving is not of central importance to most people’s daily lives, it is not an MLA.

This analysis misses the mark. As demonstrated below, the real issue should be whether driving is of central importance to an individual claimant’s life, and if so, whether it should be considered an MLA for purposes of that claimant’s action. Only then will the ADA provide “a clear and comprehensive national mandate for the elimination of discrimination,” as Congress intended.

By way of background, the Second Circuit Court of Appeals in Colwell v. Suffolk County Police Department was the first to directly address whether driving is an MLA. In Colwell, three veteran police officers brought suit

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76. Although the Third Circuit Court of Appeals also held that driving is not an MLA under the ADA, it offered no discussion or analysis of the issue and, therefore, is not discussed further in this article. Robinson v. Lockheed Martin Corp., 212 F. App’x 121, 124 (3d Cir. 2007) (citing Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329-30 (11th Cir. 2001) and Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998)).

77. Interestingly, for purposes of this article, the Supreme Court recently denied certiorari in Kellogg. Kellogg v. Energy Safety Servs. Inc., 129 S. Ct. 1916 (2009).

78. See, e.g., White v. Orange Auto Ctr., 101 F. Supp. 2d 485 (E.D. Tex. 2000) (highlighting examples of courts that have found that driving is not an MLA with little to no discussion whatsoever); Acevedo-Lopez v. Police Dept. of P.R., 81 F. Supp. 2d 293, 297 (D.P.R. 1999); Robinson, 212 F. App’x at 124; Wyland v. Boddie-Noell Enters., Inc., No. 98-1163, 1998 WL 795173, at *2 n.1 (4th Cir. Nov. 17, 1998).

79. See supra note 3; see also Yindie v. Commerce Clearing House, Inc., No. 04 C 0730, 2005 WL 1458210, at *3 (N.D. Ill. June 16, 2005), aff’d 458 F.3d 599, 601-02 (7th Cir. 2006) (“Driving in and of itself is not of central importance to daily life, on par with activities such as seeing, hearing, or working in a broad class of jobs, so it is not a major life activity as that term is used in an ADA context.”). But see Bradford v. Cellxion, LLC, 269 F. App’x 508, 510 (5th Cir. 2008) (noting in dicta that the appellant was “able to participate in major life activities such as . . . driving . . .”); Anderson v. North Dakota State Hosp., 232 F.3d 634, 636 (8th Cir. 2000) (assuming, without deciding, that driving was a major life activity for purposes of claimant who claimed her severe fear of snakes substantially limited her ability to work and drive).

80. See Winsley v. Cook County, 563 F.3d 598, 603 (7th Cir. 2009); Kellogg v. Energy Safety Servs. Inc., 544 F.3d 1121, 1125-26 (10th Cir. 2008) (“It cannot be disputed that driving is an extremely important daily activity to many, even most, adults . . . [but] the importance of the enumerated activities [in the EEOC regulations] is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident.”).


82. Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d Cir. 1998).
against the Suffolk County Police Department ("SCPD"), alleging that they had each been denied a promotion because of a disability, in violation of the ADA.83 The officers claimed that although they were each qualified for the promotion in question, they were passed over because the SCPD had a policy against promoting officers on "light duty" assignment (which all three were).84 A jury found for the officers and awarded each substantial compensatory damages.85

On appeal, the SCPD argued, in part, that the trial court erred in denying it judgment as a matter of law because none of the officers could demonstrate that they had an actual disability under the ADA.86 The court of appeals agreed with the SCPD and reversed with instructions to the trial court to enter judgment for the defendants.87 The court reasoned that although each officer suffered from a "physical impairment," none of the three could demonstrate that his impairment substantially limited his ability to perform any MLA, because none of the activities at issue, including driving, qualified as MLAs.88

Relying upon the Supreme Court's decision in Bragdon v. Abbott, which had been decided less than four months previously, the Second Circuit expressly held that the question of whether an activity is an MLA for purposes of the ADA should not be an individualized inquiry, stating:

In deciding whether a particular activity is a "major life activity," we ask whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff . . . [w]e do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by precedents as major life activities per se.89

The Colwell court reasoned that the Supreme Court impliedly adopted this approach in Bragdon when it decided that reproduction was an MLA without considering its importance in the life of the individual claimant.90 The court

83. Id. at 639.
84. Id. ("Ordinarily, a light duty assignment means that the officer is unable to perform the regular duties of a police officer, but is nonetheless able to perform some police duties subject to specific restrictions depending upon the nature of the injury.").
85. Id. at 641.
86. Id.
87. Id. at 647.
88. Colwell, 158 F.3d at 641.
89. Id. at 642 (citing Bragdon v. Abbott, 524 U.S. 624, 638 (1998)); see also Reeves v. Johnson Controls World Serv., 140 F.3d 144, 151-52 (2d Cir. 1998).
90. Colwell, 158 F.3d at 642 (citing Bragdon, 524 U.S. at 638 ("We ask, then, whether reproduction is a major life activity. We have little difficulty concluding that it is. As the Court of Appeals held, the plain meaning of the word 'major' denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance. Reproduction falls well within the phrase major life activity.") (internal citations omitted)).
considered the officers’ individual claims, including the MLAs in which each officer alleged that he was substantially limited. Of particular importance to this article, the court expressly rejected one officer’s claim that his inability to drive long distances was a disability, stating without analysis or explanation that driving is not an MLA.91

The next court to directly address the issue was the Eleventh Circuit Court of Appeals in Chenoweth v. Hillsborough County.92 In Chenoweth, an employee sought a work accommodation after being diagnosed with epilepsy, which rendered her unable to drive.93 The employee requested that she be allowed to work from home two days per week and not be required to drive between job sites, which was part of her duties prior to her epilepsy diagnosis.94 When the County refused to grant her requests, the employee brought a claim under the ADA.95

The trial court granted summary judgment to the County, finding that the employee could not demonstrate that she suffered from a disability under the ADA.96 Affirming the trial court’s decision, the Eleventh Circuit expressly held that driving is not an MLA.97 After considering the list of example MLAs found in the EEOC regulations,98 the court explained:

Although this enumeration is not exhaustive, driving is not only absent from the list but is conspicuously different in character from the activities that are listed. It would at least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure. We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving as a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn.99

91. Id. at 643 (“Colwell [has] also identified a number of activities that cannot reasonably be deemed major life activities, such as driving . . . .”); see also Carlson v. Liberty Mutual Ins. Co., 237 F. App’x 446, 448 (11th Cir. 2007) (“Driving is not a major life activity.”).
93. Id. at 1329.
94. Id.
95. Id.
96. Id.
97. Id. at 1330 (citing Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998)).
98. See ADA Employment Provisions, 29 C.F.R. § 1630.2(i) (1991); see also Americans with Disabilities Act, 42 U.S.C. § 12102(2)(a) (2009) (noting that these activities are now part of the ADA itself).
Because the employee could not demonstrate that her epilepsy substantially impaired her ability to perform other activities, such as working, which are considered MLAs under the ADA,
the court of appeals affirmed the trial court’s judgment finding in favor of the County.  

Most recently, the Seventh Circuit followed suit and expressly held that driving is not an MLA under the ADA. In Winsley v. Cook County, a county employee requested certain accommodations to her job duties, including reduced amounts of driving, after being involved in an automobile accident. In support of her claims, she submitted documentation from her psychiatrist who diagnosed her with post-traumatic stress disorder. The doctor testified that driving restrictions were necessary because the employee “would go into a full panic when she got into a car.” Over the next few years, the employee’s job duties were modified at various times to accommodate her impairment, but she eventually resigned from her position after being reprimanded for absenteeism.

The employee brought suit under both the ADA and Title VII of the Civil Rights Act of 1964. The trial court granted summary judgment to the County on all the employee’s claims, based in part upon its finding that she could not demonstrate that she had an actual disability under the ADA. On appeal, the Seventh Circuit expressly considered, as an issue of first impression, whether driving was an MLA under the ADA. Agreeing with the three other circuits that held that it was not, the court of appeals affirmed the trial court’s judgment.

Although the Seventh Circuit noted that the list of MLAs found in the EEOC regulations is not exclusive, the court held that driving lacked some characteristics the other activities all shared, stating in relevant part:

100. Many plaintiffs who claim to be impaired in their ability to drive also claim impairment in their ability to work. In fact, several courts have noted that although they do not consider driving, in and of itself, to be a major life activity, the inability to drive can substantially impair a plaintiff’s ability to perform another MLA, like working. However, the additional burdens that are placed upon an ADA claimant who alleges a substantial impairment in his or her ability to work (i.e. must show impairment in a broad class of jobs, not just single job) is a broad and lengthy topic not discussed in this article.

101. Chenoweth, 250 F.3d at 1330.
102. See Winsley v. Cook County, 563 F.3d 598, 603 (7th Cir. 2009).
103. Id. at 600-01.
104. Id.
105. Id. at 601.
106. Id. at 602.
107. Id.
108. Winsley, 563 F.3d at 602.
109. Id. (noting that it had reserved judgment on that very question in Sinkler v. Midwest Property Mgmt. Ltd. P’ship, 209 F.3d 678, 685 (7th Cir. 2000)).
110. Id. at 603 (agreeing with the 2nd, 10th and 11th circuits that driving is not a major life activity).
Most importantly, the listed activities are so important to everyday life that almost anyone would consider himself limited in a material way if he could not perform them. This is not the case with driving. In fact, many Americans choose not to drive and do not consider the quality of their lives to have been diminished by their choice. Moreover, the importance of the listed activities does not vary depending on where a person lives. The value that people assign to being able to drive, on the other hand, most certainly does . . . . Finally, unlike the listed activities, no one has a right to drive; driving on public highways is a privilege subject to revocation for a number of reasons.111

Although the court noted that the inability to drive could constitute a disability if it substantially limited the claimant’s ability to perform some other MLA, like working, it was not in and of itself an MLA.112 Because the employee failed to present evidence that her inability to drive disqualified her from a class or range of jobs,113 the court found that she could not demonstrate that she had an actual disability under the ADA.114

In each of the cases discussed above, the court ultimately found that driving was not an MLA because it is not of central importance to most people’s daily lives. Each court noted that many people can, and do, go about their daily lives without ever driving a car. However, none of the courts in question considered whether driving was of central importance to the individual claimant’s life. In other words, none of the courts used an individualized inquiry. Instead, each court simply concluded that driving is, per se, not an MLA.

Perhaps more than any of the cases discussed above, Kellogg v. Energy Safety Services demonstrates the inequitable result in applying such a per se approach to the issue of whether driving is an MLA.115 Although the author does not intend to argue that driving is an MLA in every case,116 in some cases, like Kellogg, driving is of central importance to the claimant’s life and in such cases, driving should be considered an MLA. At the very least, it is hard to understand the approach taken by the Tenth Circuit Court of Appeals in Kellogg, where it held that even in rural Wyoming, driving is not an MLA, despite the plaintiff’s demonstration that it was of central importance to her daily life.117 In particular, Kellogg illuminates how using a per se approach to the question as to what constitutes an MLA ultimately frustrates the purpose and intent of the ADA.

111. Id. at 603-04.
112. Id. at 604 (citing Sinkler, 209 F.3d at 684-85); see also Chenoweth v. Hillsborough County, 250 F.3d 1328, 1330 (11th Cir. 2001) (affirming summary judgment against plaintiff who failed to establish that her inability to drive substantially limited her ability to work).
113. See supra note 96.
114. Winsley, 563 F.3d at 604.
116. Such an argument would actually be contrary to the main premise of this article, which is that a determination of whether the activity in question is an MLA should be an individualized inquiry, based on the circumstances of each case.
117. Kellogg, 544 F.3d at 1126.
B. Kellogg v. Energy Safety Services

In *Kellogg*, the plaintiff brought an ADA claim against her former employer, alleging that it wrongfully discriminated against her in violation of the ADA by firing her after she was diagnosed with epilepsy, which prevented her from driving.\(^{118}\) Roughly four years earlier, the defendant company hired the plaintiff as a safety technician at its office in Worland, Wyoming.\(^{119}\) In her role as a safety technician, and later as a safety supervisor, the plaintiff was required to travel to oilfields to provide services to clients.\(^{120}\) When she would make such trips “in the field,” she would usually pick up a company vehicle from the shop in Worland and drive as many as two hours to the work site, where she would typically work a twelve-hour shift before leaving to drive back to Worland.\(^{121}\)

In early 2005, the plaintiff was diagnosed with complex partial seizures, a form of epilepsy.\(^{122}\) Her doctor released her to work but prohibited her from driving until further notice.\(^{123}\) Although the plaintiff requested a different position (a “reasonable accommodation”), the company ultimately informed her that it could not employ her without a full release from her doctor.\(^{124}\)

The plaintiff argued that her epilepsy was an actual disability because it substantially limited her ability to drive which, she argued, was a MLA. In denying summary judgment to the defendant employer, the trial court agreed that driving was an MLA and instructed the jury accordingly at trial.\(^{125}\) After an eight-day trial, the jury found for the plaintiff and awarded her significant compensatory damages and costs.\(^{126}\) The employer appealed, arguing in part that it was an error for the trial court to instruct the jury that driving was an MLA under the ADA.\(^{127}\)

The Tenth Circuit agreed with the employer and, relying upon cases from two other circuits,\(^{128}\) vacated the jury verdict in favor of the plaintiff.\(^{129}\) The court noted that although driving was not one of the enumerated MLAs in the EEOC regulations, its inquiry did not end there because the list was not meant to be exhaustive; rather, the court sought to determine whether driving is “of

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118. *Id.* at 1123. The plaintiff also alleged violations of the Fair Labor Standards Act (FLSA), which are irrelevant here.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Kellogg*, 544 F.3d at 1123.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* (citing Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001) and Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d Cir. 1998)).
129. *Kellogg*, 544 F.3d at 1122. Since *Kellogg* was decided, the 7th Circuit also held that driving was not an MLA. *Winsley v. Cook County*, 563 F.3d 598 (7th Cir. 2009).
Although the Tenth Circuit agreed that driving is an important activity to many, if not most adults, it held that driving is not an MLA, stating:

Without the ability to drive, it may be very difficult to care for oneself or to work. Indeed, we have recognized that the activity of “[c]aring for one’s self encompasses normal activities of daily living; including . . . driving . . . .” But driving is, literally, a means to an end. The activities enumerated by the EEOC--“caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”--are all profoundly more important in and of themselves than is driving. There are those who drive just for the pleasure of it (“Hey, let’s go for a ride”), but that practice is declining and some would now consider it unpatriotic. Moreover, the importance of the enumerated activities is not dependent on where one lives; they are valued as much by the resident of a major metropolitan area as by an isolated rural resident. Driving, in contrast, may be a minor concern for one who is near convenient mass transit and can walk to work.131

In his dissent, Judge Holloway argued that the majority’s narrow interpretation of what activities constituted MLAs was contrary to the purpose and intent of the ADA.132 Concluding, as did the district judge, that driving is an MLA, Judge Holloway noted statistical data that demonstrated that 85% percent of adults hold driver’s licenses and a reported 91% utilize an automobile to get to work.133 Thus, he argued that driving was of “central importance to most people’s lives.”134 Furthermore, Judge Holloway noted:

Driving certainly was an activity of central importance to Ms. Kellogg’s daily life. As the district judge found, she was required to travel to well sites that were a two-hour drive from the company’s offices. Nor was Ms. Kellogg’s dependence on driving particularly unusual for a Wyoming resident. The judge said he believes[] . . . there is no question that in Wyoming, where public transportation is virtually non-existent, distances between towns is [sic] measured by hours of driving, economic conditions often require residents to seek employment outside of their local community, and long winter conditions significantly limit foot or bicycle travel, driving is clearly a major life activity.135

130. Kellogg, 544 F.3d at 1125 (relying upon Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 198 (2002)).
131. Id. at 1125-26 (emphasis added) (citation omitted).
132. Id. at 1131 (Holloway, J., dissenting).
133. Id. at 1131-32 (citing U.S. Census Bureau, Statistical Abstract of the United States: 2001, Tbl. 1091 at 693).
134. Id. at 1131 (citing Arnold v. County of Cook, 220 F. Supp. 2d 893, 895 (N.D.Ill. 2002)) (holding that driving was a major life activity)).
135. Id. at 1131 n.3 (quoting the district court’s partial grant of summary judgment to the defendant).
Finding the district judge’s analysis to be “more detailed and cogent” than the appellate cases from other circuits cited by the majority, Judge Holloway argued that “[d]riving is of central importance to the daily lives of a great majority of Americans, as both common experience and Census Bureau statistics tell us.”\footnote[136]{Kellogg, 544 F.3d at 1132.} As such, he reasoned that driving should be considered an MLA under the ADA.\footnote[137]{Id.}

Interestingly, Judge Holloway took the position that driving should be an MLA because it is of central importance to most people’s lives, especially in rural Wyoming.\footnote[138]{Id.} However, even more importantly, and as Judge Holloway explicitly noted, driving was of central importance to the plaintiff’s life in this case.\footnote[139]{Id. at 1131 n.3.} Therefore, it seems illogical and contrary to the purpose of the ADA to find, as a matter of law, that driving was not an MLA for purposes of her ADA claim, merely because driving may not be of central importance to the lives of other individuals in urban settings thousands of miles away. In contrast, the majority opinion, like the precedent upon which it relied, failed to consider the individual circumstances of the claimant, and instead summarily concluded, as a matter of law, that driving was not an MLA.

Although driving might not be an MLA for all ADA claimants, just as a certain disease or condition will not “substantially limit” every claimant,\footnote[140]{See Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (citing Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998) (stating that the determination of whether a condition “substantially impairs” a claimant’s ability to perform one or more MLAs requires an individualized inquiry).} driving is certainly of central importance to some individuals’ daily lives. Although the above cases considered the issue of driving specifically, they are not atypical of most judicial determinations as to whether activities not enumerated in the ADA qualify as MLAs.\footnote[141]{Edmonds, supra note 18, at 327 (noting that courts rarely engage in analysis or discussion of this issue in ADA cases).} In fact, courts often decide whether an activity is an MLA under the ADA with little or no discussion of the issue.\footnote[142]{Edmonds, supra note 18, at 327.} As a result, not only do different jurisdictions reach different conclusions as to certain activities, these conclusions can appear arbitrary and capricious.\footnote[143]{Edmonds, supra note 18, at 370-71 (arguing that courts should establish objective factors to apply to determinations of whether an activity is an MLA for purposes of the ADA). This author agrees, but believes such factors should be applied individually to each case, so that plaintiffs who have suffered legitimate impairment relating to activities which are of importance in their lives are not barred from relief simply because the activity at issue is not equally important to all individuals.}

Many decisions deny relief to claimants who are substantially limited in the ability to perform activities of central importance to their own daily lives.\footnote[144]{See Kellogg, 544 F.3d at 1121.}
Although Congress clearly intended to protect precisely these sorts of claimants from discrimination, as demonstrated by its recent passage of the ADAAA, these individuals will continue to be denied relief unless courts modify the current interpretation of key ADA terms, including MLA. By utilizing an individualized approach in deciding whether an activity is an MLA for an individual claimant, future courts would be able to focus more precisely on that which Congress intended—more readily acknowledging MLA’s and whether an entity has complied with its obligations under the ADAAA.

V. GUIDANCE FOR FUTURE INDIVIDUALIZED INQUIRIES INTO DECIDING WHAT QUALIFIES AS AN MLA

The idea that courts should apply consistent principles to the determination of what activities qualify as MLAs under the ADA is not a unique or novel concept. It is well established that courts currently use an individualized inquiry to determine whether an ADA plaintiff satisfies the “substantially limits” prong of the ADA analysis. Therefore, it is not illogical or even revolutionary to propose that courts apply the same type of individualized inquiry to the question of whether a certain activity, such as driving, constitutes an MLA. However, to date, very few courts have done so.

Although courts previously expressed concern, as seen in Toyota Motor Mfg. and Sutton, that a broad interpretation of the ADA would provide greater coverage than Congress intended, the plain language of the ADAAA should now make clear that such concerns are unfounded. In fact, it is now obvious that Congress desires a more liberal interpretation of the ADA to effectuate its intentions.


146. ADA Amendments Act of 2008, § 2(b)(5).

147. Edmonds, supra note 18, at 374 (“Testing proposed activities against principles leads to better, more consistent results. Courts should be encouraged to adopt these principles and utilize them in future cases where the plaintiff's proposed major life activity is at issue.”).


149. See, e.g., White v. Sears, Robebuck & Co., No. 07-CV-4286, 2009 WL 1140434, at *7 (E.D.N.Y. Apr. 27, 2009) (holding that even if driving were a major life activity under the ADA, the plaintiff could not demonstrate that he was substantially limited in his ability to drive because of his epilepsy).

150. But see Sandison v. Mich. High Sch. Athletic Ass'n, 863 F. Supp. 483 (E.D. Mich. 1994), rev'd in part, 64 F.3d 1026 (6th Cir. 1995) (finding plaintiffs were substantially limited in the MLA of participating in high school athletics “because participation on the cross-country and track team is an important and integral part of the education of plaintiffs [and so] it is as to them a major life activity”).

151. ADA Amendments Act of 2008, § 2; see also 42 U.S.C. § 12102(4)(A) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).
purpose of “providing a clear and comprehensive national mandate for the elimination of discrimination.”\footnote{\textnormal{152}}

Applying an individualized inquiry to questions regarding the status of an activity, and whether it is an MLA for purposes of the ADA, would satisfy this goal. However, courts should still maintain consistent and predictable results by applying the same or similar factors to each individual case when determining whether an activity is of sufficient significance to a claimant’s life. Such factors might include the following: (1) consideration of the activity itself (which may require showing that the activity is at least somewhat common among persons other than the claimant); (2) a factual showing that the claimant actually performed the activity prior to becoming impaired; (3) a factual showing that the claimant performed the activity on a sufficiently frequent basis; and (4) a showing that there is no sufficient substitute that would alleviate the loss of the claimant’s ability to perform the activity in question.\footnote{\textnormal{153}}

Applying such a test, the Tenth Circuit would likely have concluded that driving was an MLA for Ms. Kellogg because, as Judge Holloway noted in his dissent, Ms. Kellogg was able to present evidence that driving was of central importance to \textit{her} life.\footnote{\textnormal{154}} First, it is well established that driving is a common activity among many adults, as noted by several courts who nevertheless found it was not an MLA.\footnote{\textnormal{155}} Further, statistical data demonstrates that the majority of adults in the United States possess a valid driver’s license.\footnote{\textnormal{156}} Additionally, the majority of these Americans drive on a daily basis to perform many important tasks and functions, i.e. traveling to work.\footnote{\textnormal{157}}

As for the second and third factors, Ms. Kellogg presented uncontroverted evidence that prior to her epilepsy diagnosis she was required to drive for her job and did so on a regular basis.\footnote{\textnormal{158}} Finally, it was undisputed that Ms. Kellogg lived in a rural area where public transportation was scarce, and extreme winter weather made other forms of transportation, such as biking or walking, impractical or even impossible.\footnote{\textnormal{159}} Applying the four factors stated above, it is clear that driving was of central importance to Ms. Kellogg’s life and, as such,

\footnotetext[152]{\textnormal{152. ADA Amendments Act of 2008, § 2(b)(1).}}
\footnotetext[153]{\textnormal{153. 42 U.S.C. § 12102(2)(B) (highlighting that although such a test might, at first glance, appear to disqualify activities such as reproduction (which an individual claimant might not have previously experienced or “performed”), the new version of the ADA made reproduction an MLA as a matter of law. The proposed test would only apply to activities which are not among those already enumerated by Congress, within the ADA itself.).}}
\footnotetext[155]{\textnormal{155. Winsley v. Cook County, 563 F.3d 598 (7th Cir. 2009); Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001); Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2d Cir. 1998).}}
\footnotetext[156]{\textnormal{156. U.S. Census Bureau, Statistical Abstract of the United States: 2001, Tbl. 1091 at 693.}}
\footnotetext[157]{\textnormal{157. \textit{Kellogg}, 544 F.3d at 1131-32.}}
\footnotetext[158]{\textnormal{158. \textit{Id.} at 1131.}}
\footnotetext[159]{\textnormal{159. \textit{Id.}.}}
the Tenth Circuit erred in not finding that driving was an MLA. By refusing to recognize that driving was of central importance to Ms. Kellogg’s life based upon the rationale that driving is not of central importance to most Americans’ lives, the Tenth Circuit continued the tradition of setting up roadblocks and obstacles for ADA plaintiffs.

Although courts will likely interpret the ADAAA more liberally in the future based upon Congress’s explicit disapproval of previous decisions, this new version of the ADA unfortunately fails to provide any guidelines for determining what constitutes an MLA, aside from the pre-existing enumerated examples. Therefore, it is necessary for courts to decide the appropriate standard or test by which to evaluate unlisted activities. If courts continue to utilize a per se approach, as has been done in the past, ADA claimants will continue to suffer illogical and arbitrary decisions that do not accurately evaluate their individual claims. Applying an individualized inquiry to whether an activity is an MLA will ensure that ADA claimants finally receive the broad protection from discrimination Congress intended.

VI. CONCLUSION

Congress’s recent amendments to the ADA reflect what legal scholars and critics have been saying for years: that courts’ narrow interpretations of key terms contained within the ADA undermine the stated purpose of the ADA and withhold protection and relief from deserving ADA claimants. Although the ADAAA offers some guidance as to how Congress wishes courts to interpret the phrase “substantially limits,” it is silent as to how courts should evaluate a plaintiff’s claim that an activity, not enumerated in the ADA itself, is an MLA for purposes of her claim.

Historically, courts have refused to consider the individual claimant’s circumstances. Instead, courts merely considered whether the activity at issue is sufficiently significant to most (really the vast majority of) people’s daily lives. However, this approach misses the mark and frustrates the original intent and purpose of the ADA, which is to provide broad protection to disabled individuals. To effectuate this purpose, courts should adopt an “individualized inquiry” approach to issues regarding MLAs, utilizing factors or standards like those suggested above.
WHEN PIGS FLY: DOES THE ADA COVER INDIVIDUALS WITH COMMUNICABLE DISEASES SUCH AS NOVEL H1N1 INFLUENZA, “SWINE FLU”?  

MyLinda K. Sims*

I. INTRODUCTION

The United States lost at least 550,000 Americans through the 1918 Spanish Flu1 pandemic in ten short months,2 and up to 100 million died worldwide.3 “Public health experts warn pandemic influenza poses a significant risk to the United States and the world — only its timing, severity, and exact strain remain uncertain.”4 Medical officials detected H1N1 Influenza in North America during April 2009.5 The Centers for Disease Control & Prevention (CDC) estimated that between April 2009 and December 12, 2009, there were approximately 246,000 hospitalized cases in the United States, resulting in approximately 11,160 deaths.6 While these numbers are not staggering, the possibility of widespread infection like the 1918 Spanish Influenza pandemic is a serious concern.7 There were over 15,000 cases globally of H1N1 Flu, resulting in ninety-nine deaths in the first two months of the outbreak, creating worldwide concern.8 Pandemic influenza differs from the seasonal flu because as it occurs

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1. See GINA KOLATA, FLU: THE STORY OF THE GREAT INFLUENZA PANDEMIC OF 1918 AND THE SEARCH FOR THE VIRUS THAT CAUSED IT 10 (4th prtg. 2000) (suggesting it may have become known as the Spanish Flu because Spain, unaligned during World War I, did not censor news reports and so the flu outbreak in Spain was not kept secret, unlike in other countries).
3. See KOLATA, supra note 1, at 7 (stating estimates of the death toll range from 20 to 100 million worldwide); Nat’l Inst. of Allergy & Infectious Diseases, Timeline of Human Flu Pandemics, http://www3.niaid.nih.gov/topics/Flu/Research/Pandemic/TimelineHumanPandemics.htm (last visited Jan. 19, 2010) (estimating 20 to 50 million people died worldwide).
5. See Nat’l Inst. of Allergy & Infectious Diseases, supra note 3.
7. See Nat’l Inst. of Allergy & Infectious Diseases, supra note 3.
only three or four times per century, most individuals have no resistance and vaccines are not readily available.9

Novel H1N1 Influenza is a respiratory infection caused by a virus, containing genetic materials from human, swine, and avian flu viruses.10 During the H1N1 outbreak, President Obama advised Americans with flu symptoms to stay home from work.11 What consequences should ill employees suffer as a consequence of flu-related absenteeism? This article examines whether individuals affected with a communicable disease should be afforded the protections of the Americans with Disabilities Act (ADA) and argues that persons infected with severe communicable disease such as H1N1 Influenza should be afforded the protections of the ADA.

II. BACKGROUND AND FACTS

A. Historical Overview of Disability Law

1. Americans with Disabilities Act of 1990

In the summer of 1988, Governor Michael Dukakis was running against then-Vice President George H.W. Bush in the pending presidential election, and was the subject of rumors regarding psychiatric treatment.12 A reporter asked then-President Ronald Reagan if he thought Dukakis’ refusal to provide his medical records was hurting his campaign.13 President Reagan remarked, “Look, I am not going to pick on an invalid.”14 After George H.W. Bush’s initial refusal to discuss the issue, on August 11, 1988, he asked Congress to consider passing disability discrimination legislation.15 After his inauguration, President Bush charged Attorney General Richard Thornburgh with the duty of getting “major disability discrimination legislation” passed.16 Whether Bush’s urging was the

11. See Dep’t of Health & Human Servs., How Does Seasonal Flu Differ From Pandemic Flu?, supra note 9.
13. Id.
15. Id. at 5 (citing Lamar, supra note 14).
16. Id.
result of President Reagan’s comments or compassion for his sons with medical problems17 or something else is unknown. President Bush signed the ADA into law on July 26, 1990.18 The ADA was touted as “the most sweeping piece of civil rights legislation possibly in the history of our country”19 and a “model for the world.”20

The ADA consists of five titles. The section entitled “General Provisions” includes definitions and findings.21 It is within this General Provisions section that Congress provided the definition for “disability”: “The term ‘disability’ means, with respect to an individual - (A ) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”22 A and B are commonly referred to as the “functionality test.”23

Title I prohibits discrimination in employment, which, with few exceptions, applies to employers who have fifteen or more employees.24 Title II prohibits discrimination in the areas of public services and transportation.25 Title III prohibits discrimination at places of public accommodations and services provided by private entities such as restaurants, theaters, hotels, retail stores, and recreational facilities.26 Title IV establishes telecommunications services for individuals with hearing or speech impairments.27 Title V contains miscellaneous provisions, such as exclusions, certain state immunities, attorney’s fees, prohibitions on retaliation, and how the ADA is to be construed.28

The ADA was built on the precedent of Section 504 of the Rehabilitation Act and the Civil Rights Act of 1964.29 Case law and extensive regulations interpreting these statutes broadly provide persuasive authority for interpreting the ADA.30 Despite this backdrop, the lower courts and the Supreme Court had departed from the original congressional intent of the ADA,31 which was to

17. Id. (noting that Bush’s son Neil suffers from dyslexia and son Marvin had a colostomy procedure).
18. COKER, supra note 12, at 5.
20. COKER, supra note 12, at 6.
21. COKER, supra note 12, at 17.
29. COKER, supra note 12, at 15-17.
30. See COKER, supra note 12, at 15-17.
provide “very broad” protection for Americans with disabilities and “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Congress responded to the Supreme Court’s narrow application of the ADA by passing the ADA Amendments Act of 2008.

2. ADA Amendments Act of 2008: Significant Changes

Following in his father’s footsteps, President George W. Bush signed the ADA Amendments Act of 2008 (ADAAA) into law on September 25, 2008, and they went into effect on January 1, 2009. The ADAAA made a number of significant changes, focusing almost exclusively on the definition of disability and the scope of coverage. As explained below, Congress’s aim in passing the ADAAA was to require more scrutiny of employers’ treatment of employees by liberalizing the standard for being included within the protected class.

First, Congress considered supplementing the definition of disability by adding language such as “materially restricts” to further explain the degree of disability reflected in the term “substantially limits.” The ADA defines “disability” as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” However, Congress ultimately decided not to change the actual definition of disability, but instead clarified its original intent. Rather than altering the qualifications for disability consideration, Congress amended the ADA language to state that the term “substantially limits” should be defined less restrictively than the courts or the Equal Employment Opportunity Commission (EEOC) had interpreted. Congress stated that the definition of disability “shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” In addition, Congress stressed that “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008,” in which

32. COLKER, supra note 12, at 65.
38. 154 CONG. REC. S8345 (daily ed. Sept. 11, 2008).
Congress rejected an earlier Supreme Court case because it unduly narrowed the scope of disability. \(^{44}\) Congress viewed the Court’s prior decisions as creating an inappropriately high and unnecessary barrier to those seeking protection. \(^{45}\)

Second, Congress explained the definition of a “major life activity” was expanded to include “major bodily functions.” \(^{46}\) Major bodily functions include, but are not limited to: “immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” \(^{47}\) Prior to the ADAAA, such functions were not covered by the ADA, even though states such as New York included “bodily functions” within their state statutory definitions of “disability.” \(^{48}\)

Third, Congress defined “impairment” as something that “substantially limits one major life activity.” \(^{49}\) Prior to the ADAAA, such functions were inconsistently covered by the ADA because Congress stated that “the term ‘substantially limits’ as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test for determining whether an individual has a disability.” \(^{50}\) Congress noted that the “functionality test” included an evaluation of “condition, duration and manner” of the individual’s disease on major life activities as compared to most other people’s abilities to perform those tasks. \(^{51}\)

Fourth, Congress required that impairments be considered in their unmitigated state when assessing whether they fall within the definition of “disability.” \(^{52}\) Congress specifically overruled the Supreme Court’s definition of disability from *Sutton v. United Air Lines, Inc.* (and its two “companion cases”), \(^{53}\) in which the Court ruled that an individual who is able to mitigate his impairment through medication or other auxiliary services should be considered in their “corrected state.” \(^{54}\) In effect, when an individual sought corrective medical treatment, that treatment was held against him for determination of whether he had a disability, while an individual who had the same impairment

\(^{44}\) See ADA Amendments Act of 2008 §§ 2(a)(5)-(8); see also Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002); supra note 31 and accompanying text

\(^{45}\) See ADA Amendments Act of 2008 § 2(a)(8).


\(^{48}\) See, e.g., Davis v. Bowes, No. 97-9496, 1998 WL 477139, at *2 (2d Cir. July 22, 1998) (“The [New York State Human Rights Law]’s definition of ‘disability’ is broader than that contained in the ADA, and ‘covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future.’”).


\(^{50}\) 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008).

\(^{51}\) Id.


\(^{54}\) Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999) (emphasis added); see also COLKER, supra note 12, at 105 (discussing in-depth the holding in *Sutton*).
but had not sought medical treatment would be considered “disabled” within the
definition.\textsuperscript{55} Thus, the ADAAA resolved the “Catch-22” that had been
established in regard to mitigating measures.\textsuperscript{56}

Fifth, Congress clarified that an impairment that is “episodic or in
remission,” such as epilepsy or cancer, “is a disability if it would substantially
limit a major life activity when active.”\textsuperscript{57} This provision is based on Congress’s
intent that courts consider the total effect of the impairment, rather than whether
the impairment can be controlled with medication or treatment.\textsuperscript{58}

Sixth, Congress broadened the “regarded as” prong of the disability
definition.\textsuperscript{59} An employee need not demonstrate that the employer regarded her
as substantially limited in one or more of the major life activities.\textsuperscript{60} Rather, now
an employee is “regarded as” disabled if she suffers an adverse employment
action that is covered by the ADA.\textsuperscript{61} However, Congress provided an exception
to this prong of the definition by excluding those with “transitory and minor”
diseases, which are defined as impairments lasting “6 months or less.”\textsuperscript{62} The
Senate noted that this limitation was necessary under the “regarded as” prong
because these individuals did not have to pass the “functionality test” like
individuals under the first or second prongs of the definition of disability.\textsuperscript{63}

The provisions of the ADA that Congress did not alter are equally significant
as those provisions that were changed.\textsuperscript{64} Congress did not change the following
statutory terms: “reasonable accommodation”, “undue hardship”, “essential
functions”, “qualified individual”. or “direct threat”.\textsuperscript{65} These definitions and the
case law discussing them remain unaltered and continue to serve as the
standard.\textsuperscript{66} Thus, employers can raise “direct threat” or “otherwise qualified” as
affirmative defenses when accused of discriminating against a person with a
communicable disease.\textsuperscript{67} These unaltered definitions will also be instrumental in
properly evaluating whether an individual with an infectious disease is afforded
the protection of the ADA.

\textsuperscript{56} Id. at S8350. See also ADA Amendments Act of 2008 § 2(b)(2) (discussing the rejection
of the Sutton holding).
\textsuperscript{59} 42 U.S.C.A. § 12102(3)(A) (West 2005 & Supp. 2009); see also ADA Amendments Act of
2008 § 2(b)(3) (reinstating the broad view of the “regarded as” prong of the disability definition, as
articulated by the Court in Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)).
\textsuperscript{60} Feldblum, supra note 40, at S3.
\textsuperscript{61} Feldblum, supra note 40, at S3.
\textsuperscript{63} 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008).
\textsuperscript{64} See ADA Amendments Act of 2008 §§ 1-8.
\textsuperscript{65} Attorneys Discuss Questions Raised by ADA Amendments, 17 Am. With Disabilities Act
\textsuperscript{66} See id.
\textsuperscript{67} 42 U.S.C. § 12111(3) (2006); see also infra Part III.A.2. (discussing in detail direct threat).
With the ADAAA, Congress incorporated the standards set out in 1987 by the Supreme Court in *School Board of Nassau County v. Arline*, discussed below, which was decided prior to the enactment of the ADA of 1990, and rejected *Sutton*.69

**B. School Board of Nassau County v. Arline**

In 1987, the Supreme Court ruled that a schoolteacher infected with the contagious disease of tuberculosis was a “handicapped person,” based on Section 504 of the Rehabilitation Act.70 Thus, in 1987, an individual infected with a communicable disease could be protected under Section 504.71

Gene Arline taught elementary school for thirteen years, during which time she suffered three relapses of tuberculosis within a two-year period.72 She was discharged from her duties after her third relapse and filed suit under Section 504 of the Rehabilitation Act.73 The School Board argued that Arline was discharged “not because she had done anything wrong,”74 but because she was a threat “to the health of others.”75

The Court considered the definition of “handicapped individual” in Section 504, which includes “[any] person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”76 The Court recognized Congress’s intent to provide broad protection against discrimination through Section 504.77 The Court also considered the regulations promulgated by the Department of Health and Human Services, drafted under the watchful eye of Congress.78 These regulations defined two terms that the Court deemed significant to the question at bar.79 The first was “physical impairment,” which is defined as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one

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69. See ADA Amendments Act of 2008 § 2(b)(3).
72. Id. at 276.
73. Id.
74. Id. (citing App. at 49-52).
75. Id. at 281.
77. *Arline*, 480 U.S. at 279-80 n.5.
78. Id. at 279.
79. Id. at 279-80.
or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine.\textsuperscript{80} The second definition of significant importance was “major life activities,” which are defined as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{81}

The Supreme Court considered the question of whether Arline was handicapped within the statutory definition.\textsuperscript{82} The Court held that tuberculosis had impaired Arline’s respiratory system and that “[t]his impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment.”\textsuperscript{83} The Court held that her hospitalization for tuberculosis established that she had a “record of . . . impairment.”\textsuperscript{84}

The School Board had conceded that a person may be handicapped by a contagious disease,\textsuperscript{85} but argued that an employee posing a hazard to others should not be afforded protection under Section 504.\textsuperscript{86} The Court declined to make the distinction, finding that “discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504.”\textsuperscript{87} The Court concluded “that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage.”\textsuperscript{88} That person must be “otherwise qualified” for the position, however.\textsuperscript{89}

The Court declined to answer the question of whether Arline was “otherwise qualified” because the district court would have had to make factual assessment of her condition.\textsuperscript{90} However, the Court did provide criteria to consider when determining whether a person is a “direct threat.” Adapting the position of the American Medical Association expressed in its amicus brief, the Court provided that determining whether someone poses a “direct threat” requires evaluating “(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be

\textsuperscript{80.} Id. at 280 (citing 45 C.F.R. § 84.3(j)(2)(i) (1985) (current version at 45 C.F.R. § 84.3(j)(2)(i)(A) (2010))).
\textsuperscript{81.} Id. (citing 45 C.F.R. § 84.3(j)(2)(ii) (1985)).
\textsuperscript{82.} Id.
\textsuperscript{83.} Id.
\textsuperscript{84.} Arline, 480 U.S. at 281.
\textsuperscript{85.} Id.
\textsuperscript{86.} Id.
\textsuperscript{87.} Id. at 284.
\textsuperscript{88.} Id. at 286.
\textsuperscript{89.} Arline, 480 U.S. at 287.
\textsuperscript{90.} Id.
transmitted.” 91 In addition, the Court stated that courts should consider whether an employer could make a reasonable accommodation for such an employee. 92

On remand, the district court determined that Arline was “otherwise qualified” for her position because “reasonable accommodation [would] eliminate … risk” of infecting others. 93 The court then considered carefully each of the criteria listed by the Supreme Court for determining “direct threat,” concluding that the School Board had terminated Arline based on “accumulated myths and fears about tuberculosis” rather than on “reasonable medical judgments.” 94 Thus, Arline won her case.

C. Modern Day Novel H1N1 Flu “Swine Flu”

Novel H1N1 began spreading in the United States in April 2009. 95 On June 11, 2009, the World Health Organization (WHO) declared H1N1 a “pandemic, phase 6 of the global pandemic description.” 96 The declaration of pandemic refers to the global spread of influenza rather than to its severity. 97 “Pandemic” was defined to mean that the contagious disease had been confirmed on multiple continents and was spreading from human to human by contact. 98 WHO labeled the pandemic as “moderately severe.” 99 Experts refer to the spectrum of individual infections ranging from “mild,” which requires no treatment, to “very severe,” causing hospitalization and even death. 100 These experts stated that in the U.S., 71% of those patients hospitalized with H1N1 had pre-existing or complicating health conditions. 101 As of December 12, 2009, the CDC estimated

92. Id. at 288.
94. Id. at 1292.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id. Cf. H1N1 Takes Significant Toll, AUSTL. NURSING J., Nov. 1, 2009, at 10 (citing a study which found that two-thirds of those hospitalized in Australia & New Zealand at the height of the pandemic had pre-existing conditions); Ctrs. for Disease Control & Prevention, supra note 95 (“About 70 percent of people who have been hospitalized with this 2009 H1N1 virus have had one or more medical conditions previously recognized as placing people at ‘high risk’ of serious seasonal flu-related complications.”). But see Associated Press, Half of Sickest H1N1 Patients Had Been Healthy, MSNBC, Oct. 13, 2009, http://www.msnbc.msn.com/id/33294842 (stating that the “largest U.S. analysis of hospitalized adult swine flu patients” found that forty-six percent “did not have a chronic underlying condition”).
that there had been approximately 246,000 hospitalized cases in the United States and approximately 11,160 deaths.\textsuperscript{102}

Novel H1N1 Influenza appears to be transmitted just like seasonal flu.\textsuperscript{103} Seasonal flu is generally spread when a person coughs or sneezes and “infected droplets” are sprayed into the air and inhaled by another person.\textsuperscript{104} In addition, if a person coughs into her hand, these droplets can transfer to another individual by physical contact.\textsuperscript{105} Individuals are deemed to be contagious one day prior to displaying symptoms and up to seven days after becoming symptomatic.\textsuperscript{106} Most of those infected with H1N1 experience similar symptoms as those infected with seasonal flu, such as “fever, cough, sore throat, runny or stuffy nose, body aches, headache, chills, fatigue, sometimes diarrhea and vomiting.”\textsuperscript{107} While there is a risk of transfer, everyday precautions are generally all that are necessary to prevent infections from spreading.\textsuperscript{108} Everyday precautions include proper hand washing, covering nose and mouth during a cough, using antibacterial wipes, and quickly disposing of used tissues.\textsuperscript{109} In fact, those who have family members who become infected should not stay home from work, but rather should continue their daily activities.\textsuperscript{110}

Seasonal flu affects all age ranges; however, most complications arise in children under the age of two, in adults over sixty-five, or among individuals who have pre-existing medical conditions.\textsuperscript{111} Novel H1N1 was primarily detected among those ages five to twenty-four,\textsuperscript{112} but then rapidly spread among those ages ten to forty-five.\textsuperscript{113} According to the CDC, those “65 and older are the least likely to be infected with H1N1 flu.”\textsuperscript{114} Medical experts believe that one-third of adults over the age of sixty “may have antibodies against this virus.”\textsuperscript{115}

Medical experts recommend H1N1 Influenza be treated with the antiviral drugs Oseltamivir (Tamiflu) and Zanamivir, which are commonly used to treat

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102. Ctrs. for Disease Control & Prevention, supra note 6.
103. Ctrs. for Disease Control & Prevention, supra note 95.
105. Id.
106. Ctrs. for Disease Control & Prevention, supra note 95.
108. See Ctrs. for Disease Control & Prevention, supra note 95.
109. See Ctrs. for Disease Control & Prevention, supra note 95.
110. See Ctrs. for Disease Control & Prevention, supra note 95.
111. WHO, supra note 104.
112. CDC Press Conference, supra note 96.
114. Ctrs. for Disease Control & Prevention, supra note 95.
115. See Ctrs. for Disease Control & Prevention, supra note 95.
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seasonal influenza. Most people develop some immunity to seasonal influenza, thus reducing the ease of its spread, although the virus’s genetic composition is slightly different each season. However, since H1N1 is novel, individuals in most cases do not have immunity against its infection. Another significant difference between H1N1 and seasonal flu is that initially a vaccination for H1N1 did not exist. The development of a vaccination is an extensive process that can take months, and a vaccine for H1N1 became available only in limited quantities during October 2009.

III. ARGUMENT

Persons infected with communicable diseases such as Novel H1N1 should be afforded the protections of the ADA if such individuals satisfy the functionality test outlined by the Supreme Court in School Board of Nassau County v. Arline adopted by Congress via the ADAAA in 2009. Some legal scholars before 2009 had labeled persons infected with contagious diseases as not “disabled” within the meaning of the ADA because of the short-term duration of the disease, while others speculate without ample justification that such persons should be afforded the protection of the ADA. Additionally, some courts before 2009 had regarded individuals with communicable diseases such as influenza as per se beyond the scope of the definition of disability under the ADA. The regulations governing the definition of “substantially limits,”

118. WHO, supra note 113.
119. Ctrs. for Disease Control & Prevention, supra note 116.
122. See generally Carl H. Coleman, Beyond the Call of Duty: Compelling Health Care Professionals to Work During an Influenza Pandemic, 94 IOWA L. REV. 1, 20-21 (2008) (explaining that a person with communicable disease such as pandemic flu can be incapacitated but still may not be afforded the protections of the ADA); Mark A. Rothstein & Meghan K. Talbott, Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation, 10 J. HEALTH CARE L. & POL’Y 239, 246 (2007) (arguing that communicable diseases, such as influenza and pneumonia, that are temporary and can be mitigated by medication do not fall within the protection of the ADA); Ariel R. Schwartz, Doubtful Duty: Physicians Legal Obligation to Treat During an Epidemic, 60 STAN. L. REV. 657, 669-71 (2007) (postulating that those with highly infectious disease should be afforded the protections of the ADA); Allan H. Weitzman & Kimmone M. Ottley, Asian Flu Pandemic: A Legal Framework for the Wary Employer, 16-Fall INT’L HR J. 6 (2007) (contending that pandemic influenza would fall within the transitory provision of the ADA and thus exclude infected person from coverage).
123. Williams v. Phila. Hous. Auth. Police Dept., 380 F. 3d 751, 765 (3d Cir. 2004) (citing EEOC guidelines which cite 29 C.F.R. §1630.2(j)(2) stating that impairments that are temporary or of short duration do not substantially limit); Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002) (determining that pneumonia is temporary and does not meet the statutory definition); Halperin v. Abacus Tech. Corp., 128 F.3d 191, 200 (4th Cir. 1997) (holding that infectious diseases that temporarily affect a person’s ability to work are not afforded the protection of the
which are under revision as required by the ADAAA, previously focused on the duration of the impairment, excluding those with communicable diseases such as influenza because their impairments were temporary. While there is not a categorical answer to the question of whether a person with a contagious or infectious disease should be considered “disabled” within the definition of the ADA, a careful and deliberate analysis should be conducted on a case-by-case basis to determine whether one infected with a communicable disease is covered by the ADA.

A. Arline’s Legal Framework for Determining Disability

Arline, as interpreted by the ADAAA, provides a clear legal framework to guide a court’s analysis in determining if and when a person with a communicable disease should be afforded the protections of the ADA and ADAAA. This legal framework should also inform the EEOC as regulatory revisions are promulgated. First, the court should consider the definition of disability, as revised by the ADAAA. Second, if the court finds the individual to have a disability, then it must consider whether the person poses a direct threat to others. Finally, even if the court finds that the person is a direct threat, the court must then consider whether the direct threat could be alleviated through reasonable accommodations.

1. Step One: Definition of Disability

Again, individuals are deemed to be within the definition if they fall within any of the following which are to be liberally construed: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”

In May 1989, bills were introduced in the Senate and the House of Representatives. There was “careful and deliberate debate,” which included...
discussions regarding: (1) individuals infected with the HIV virus,134 (2) remedies135 (3) communicable diseases,136 and (4) food-handling concerns.137 Eventually, after multiple hearings and two conferences, the Senate and the House resolved their differences and the ADA passed Congress with overwhelming support.138 Representative Dannemeyer proposed an amendment to the ADA of 1990 that would have categorically excluded individuals with communicable diseases from the definition.139 However, that amendment failed.140 Therefore, it is reasonable to conclude that Congress determined that it would not exclude individuals with communicable diseases per se from the definition of disability.

While Congress did not exclude individuals with contagious or infectious diseases from the definition of disability, it did provide guidance in two specific areas.141 First, Congress limited individuals infected with contagious diseases from positions in food service.142 However, even within this restriction, Congress required employers to consider whether an individual could perform the job with “reasonable accommodation.”143 Second, Congress excluded from coverage those who are “regarded as” being disabled because of “impairments that are transitory and minor.”144 Such persons could nonetheless qualify under the first or second prong of the definition of disability. Thus, through these changes, Congress has established that individuals with infectious or communicable diseases should not be excluded per se from the definition of disability under the ADA.

The question remains as to how individuals affected with a communicable disease should be treated under the ADA. The rules of construction establish that “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”145 Individuals with communicable or infectious diseases must be considered in light of Congress’s clearly stated intent. These individuals should be held to the same standard and evaluation as other

134. See COLKER, supra note 12, at 26-27, 34, 38, 41, 46, 52-56 (Congress debated extensively the issue of whether or not an individual infected with HIV would be afforded the protections of the ADA. Ultimately supporters of the bill agreed that such individuals were included.).
135. See COLKER, supra note 12, at 49-50.
136. COLKER, supra note 12, at 62 (citing 136 CONG. REC. 17278 (1990)).
137. See COLKER, supra note 12, at 55-59, 61-63 (Congress discussed a provision originally proposed under the Chapman amendment which excluded individuals that posed a direct threat from handling food service. This amendment was later replaced by the Hatch amendment and the exception passed.).
138. COLKER, supra note 12, at 64.
139. See supra note 136 and accompanying text.
140. See supra note 136 and accompanying text.
141. See supra notes 59-63, 137 and accompanying text.
142. See supra note 137 and accompanying text.
individuals under the first and second prongs of the definition of disability - the “functionality test.” This test involves a “physical or mental impairment that substantially limits one or more major life activities” or “a record of such an impairment.” Whether an impairment “substantially limits” major life activities turns on “whether a person’s activities are limited in condition, duration and manner” as compared to other individuals.

In Arline, the Court determined that a hospitalization is a bright-line indicator for courts because persons who are hospitalized are at least limited in their ability to care for themselves, if not for other major life activities. Otherwise hospitalization would be unnecessary. Arline also stated that hospitalization was a clear “record” of impairment, which would satisfy the second prong of the definition. Absent hospitalization, a court should consider evidence concerning the “condition, duration and manner” of the impairment. The baseline analysis is a “comparison to most people.”

a. Application to Novel H1N1 Influenza

In Arline the Court considered the communicable disease of tuberculosis, which affects individuals along a spectrum of severity. Novel H1N1 influenza, like many other communicable diseases, also affects individuals along a continuum. Because infected individuals fall along a continuum, it cannot be argued that such individuals suffer from a disability per se, but rather that a careful individual assessment is required, as conducted by the Court in Arline. Individuals infected with H1N1 on the mild end of the spectrum would most likely experience a full recovery with medications like Tamiflu, and would not meet the functionality test under the first and second prongs of the definition of disability. On the other end of the spectrum, individuals who suffer severely and require hospitalization would satisfy the bright line established by the Court.

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146. See supra notes 62-63 and accompanying text.
150. See supra note 81 and accompanying text, note 107.
151. See supra note 85 and accompanying text.
153. 154 Cong. Rec. S8346 (daily ed. Sept. 11, 2008); see also 29 C.F.R. 1630.2(j)(1) (2010) (comparing an individual’s ability to perform a major life activity to the ability of the average person in the general population to perform the same major life activity).
155. See CDC Press Conference, supra note 96.
157. See CDC Press Conference, supra note 96; see also The Economist Intelligence Unit, World Pharma: Preparing the Defenses, HEALTHCARE & PHARM. FORECAST, Apr. 27, 2009, at 2 (describing Tamiflu as “the main weapon” against H1N1).
However, for those individuals who are not hospitalized but are nonetheless impaired, the court should consider the “condition, duration and manner” of the impairment. These individuals would fall in the middle of the spectrum, and courts should determine whether the impairment “substantially limits one or more major life activities.” An individualized assessment is required for those who suffer from communicable diseases like Novel H1N1 influenza or tuberculosis because such diseases affect individuals along a spectrum and to differing degrees.

2. Step Two: Direct Threat

Once a court has determined that an individual is disabled within the meaning of the ADA, the second step is to analyze whether the individual poses a direct threat to others. In the ADAAA, Congress chose not to alter the definition or the Supreme Court’s interpretation of “direct threat.” “The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” As in Arline, an employer who proves an employee poses a “direct threat” demonstrates that the employee is not “otherwise qualified” for a position. The Supreme Court did not decide this issue in Arline, but set forth the following criteria for courts to apply: “(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious, (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted.” As noted by the district court, the evaluation of communicable diseases must be based on medical evidence rather than “fears or myths.” The remainder of this section applies this test to Novel H1N1 influenza.

a. Application to Novel H1N1 Influenza

Upon remand, the district court in Arline balanced the four factors discussed above and ultimately found that Ms. Arline was otherwise qualified for her duties as a schoolteacher, despite being infected with tuberculosis. Courts should also balance these factors in determining if a person with H1N1 or another communicable disease poses a direct threat to those around them.

158. See supra note 84 and accompanying text.
161. See supra note 65 and accompanying text.
165. See supra notes 93-94 and accompanying text.
Similarly, despite that people may worry about H1N1, those infected with H1N1 do not constitute a “direct threat.” First, courts must evaluate the nature of the risk and how the disease is transmitted. H1N1, like tuberculosis, is an air-borne disease transmitted through droplets expelled by an infected individual and inhaled by another. The “rapid influenza diagnostic test” used to determine whether an individual is infected with H1N1 is simple and can be performed in a routine medical exam with results available after only thirty minutes. In this respect, the two diseases are the same. However, the H1N1 “rapid” diagnostic tests can often produce negative results even if the individual is infected with the virus. Therefore, an individual who receives a negative “rapid” test result may still be infected with H1N1.

Second, courts must examine the duration that an individual poses a risk. The communicability of tuberculosis is generally eliminated within two weeks after medical treatment has begun. H1N1 has a much smaller window in which patients are infectious. Thus, patients with H1N1 have a smaller duration of risk than individuals infected with tuberculosis.

Third, courts must consider the severity of the risk or the “potential harm to third parties.” Tuberculosis is most contagious in confined areas with persons with whom extensive time is spent. Ms. Arline’s family, consisting of her husband and two sons ages six and seven, all tested negative for tuberculosis, which suggested that the risk was not severe. Likewise, those infected with H1N1 do not automatically transfer the disease to family members or to those who are in close contact with infected individuals.

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169. Id. at 1287-88.


171. Id.

172. Id. In addition to the “rapid” H1N1 test, more sensitive testing with more accurate results is available at limited locations, such as hospitals and some medical laboratories. Id.

173. See Arline, 692 F. Supp. at 1291.

174. Id. at 1289.

175. Ctrs. for Disease Control & Prevention, supra note 95 and accompanying text.

176. See Ctrs. for Disease Control & Prevention, supra note 95 and accompanying text.


178. Id. at 1289.

179. Id. at 1290.

180. See supra Part II.C.
The last inquiry for the courts is the “probabilities the disease will be transmitted.” 181 “[O]nce a person begins medical treatment for tuberculosis, the risk of communicability becomes very small.” 182 H1N1 differs from tuberculosis in that H1N1 spread initially at a faster rate; however, this rate is still categorized as moderate. 183 As a result, the CDC and WHO have not restricted travel, required masks, or advised isolations or quarantines, but rather have advised only minor precautions. 184

In sum, an individual infected with H1N1 does not pose a direct threat to those around him. The virus is responsive to medication in most cases. 185 Furthermore, individuals infected with H1N1 have an extremely small window in which they are considered contagious, and an individual would have to be in close enough proximity to a person infected to inhale infected droplets. 186 These characteristics demonstrate that H1N1 does not pose a direct threat.

While there is extensive public concern over use of words such as “pandemic” and “epidemic,” there is not a direct medical threat imposed by those infected with H1N1. 187 The Court in Arline stated that the decision to fire Ms. Arline was based on “society’s accumulated myths and fears” rather than sound medical advice. 188 It is important that when courts apply the test, medical evidence is thoroughly considered and decisions are not based on public paranoia. 189 H1N1 may perhaps reach a stage in which the CDC or WHO determines that there is a direct threat. However, courts should give deference to the factual determination about the level of threat made by those organizations monitoring the situation.

3. Step Three: Reasonable Accommodation

In the event that a court determines through medical evidence that a person with a communicable disease poses a direct threat, the court’s analysis does not end there. The ADA requires that the court consider whether such an individual can be reasonably accommodated. 190 “Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application
A reasonable accommodation can include a modification of “equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” The district court in Arline did not reach this level of analysis because it found that tuberculosis was not a direct threat.

a. Application to Novel H1N1 Influenza

If reasonable accommodations were needed for an individual suffering from H1N1 influenza, they would be similar to those available to individuals suffering from tuberculosis, because transmission of the two diseases is similar. The CDC recommends that an individual remain absent from work during the period of time in which the person is contagious. Scheduled leave should be considered a reasonable accommodation. In most cases, individuals will have sick leave to cover this short period of time. If a person does not, the Family Medical Leave Act could provide for up to twelve weeks of leave for medical concerns. Other options for reasonable accommodations could include properly wearing a mask to eliminate the spread of the contagious airborne droplets or providing anti-bacterial hand lotion. It has recently been stated by the EEOC that telecommuting from home could be considered a reasonable accommodation as well in such situations. There are multiple ways in which a person with a communicable disease can be reasonably accommodated. These options should be fully explored before determining that an individual with a communicable disease is not afforded the protections of the ADA.

IV. CONCLUSION

Through the ADAAA, Congress has attempted to move back to the original intent of liberally protecting individuals discriminated against because of disability. It has attempted to shift the courts’ focus to issues concerning whether discrimination has occurred rather than to rigidly excluding people from coverage. It is with this legislative intent that persons with communicable diseases should be considered for protection under the ADA. While there is not

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194. See supra Part II.C.
195. See supra notes 102-06 and accompanying text.
198. Id.
a clear answer to the question, Congress has provided clear direction through incorporating the Supreme Court’s reasoning in *Arline*.

Courts should apply the legal framework from *Arline* to determine whether particular individuals with communicable diseases should be afforded the protections of the ADA. First, courts should consider with leniency the definition of disability as revised in the ADAAA. Second, courts should determine whether a person with a communicable disease is a direct threat based on medical evidence. Finally, if a person is a direct threat, courts then should consider whether that person could be reasonably accommodated.

Individuals infected with communicable diseases are sometimes reluctant to comply with medical advice or treatment, such as isolation or quarantines, because of the possibility of loss of income. Under the ADA, an individual is protected against adverse employment decisions, such as termination, which in turn provides job security.

It could be argued that the Family and Medical Leave Act (FMLA) should be utilized in these situations rather than expanding the ADA to accommodate such individuals. This argument fails for two reasons. First, the FMLA applies only to employers with fifty or more employees, whereas the ADA applies to employers with fifteen or more employees. Relying on the FMLA would create a gap in coverage by eliminating protection for individuals working in small businesses. Second, the FMLA states that employers can require the employee to be certified to perform the essential functions of the job before returning to work. Under the ADA, this certification is not required to consider whether a person could perform the job with a reasonable accommodation. If the FMLA applied to these individuals instead of the ADA, employers could arguably discriminate against employees who develop short-term communicable diseases while on FMLA leave, and bar their return to work until the individual obtains a physician’s certification.

In addition, the ADA protects individuals from discrimination in the receipt of medical treatment, which is classified as a “service.” An individual outside the protection of the ADA can be refused medical treatment. During pandemic situations, it is imperative that individuals seek immediate medical attention to reduce the infection spreading and for the medical community to

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199. See Rothstein & Talbott *supra* note 122, at 243 (stating that one of the major reasons for noncompliance with quarantines is loss of financial income).
206. See Schwartz, *supra* note 122 (postulating that doctors’ obligation to treat individuals infected with communicable disease during an epidemic is uncertain and could result in refusal to provide services unless a legal framework is established).
have accurate reporting records. Thus, the protection of the ADA encourages individuals to receive medical treatment because it reduces the fear of discrimination, which ultimately would reduce the spread of infectious diseases. The idea of using the protections of the ADA to prevent the spread of communicable disease by removing barriers to treatment and reporting was acknowledged within the language of Arline.

Novel H1N1 influenza as a recent communicable disease has received much public attention and thus can be used as an example of how to apply this legal framework. However, this analysis does not only apply to pandemic situations. The legal framework is also applicable to other communicable diseases, such as pneumonia or hepatitis. In sum, individuals with communicable diseases should not be excluded per se from the protections of the ADA, but rather should be analyzed in terms of the standards set forth under Arline and in the spirit of congressional intent.

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207. See Equal Employment Opportunity Comm’n, supra note 197.